No. 11733

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

J. H. GALLAGHER, J. IRA McNUTT and EARL L. McNUTT,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

HENRY L. HESS,
EDWARD B. TWINING,
V. E. HARR,
United States Court House,
Portland, Oregon,
For Appellant.

JAMES C. DEZENDORF,
800 Pacific Bldg.,
Portland, Oregon,
For Appellees.

In the District Court of the United States
for the District of Oregon

Civil No. 3242

J. H. GALLAGHER, J. IRA McNUTT and EARL L. McNUTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

I.

This action arises under the Act of March 3, 1887, c. 359, Sections 1, 2, 24 Stat. 505, as amended; U.S.C., Title 28, Sections 41(20) and 250(1), commonly known as the Tucker Act, as hereinafter more fully appears.

II.

Plaintiff J. H. Gallagher resides in the City of Corvallis, Benton County, Oregon; Plaintiffs J. Ira McNutt and Earl L. McNutt reside in the City of Eugene, Lane County, Oregon.

III.

The nature of Plaintiffs' claim is upon a contract, implied in fact, with the Government of the United States for a reasonable and fair market value of the use of a certain road belonging to Plaintiffs, which was used by authorized officers and agents of the United States with knowledge of Plaintiffs' ownership thereof.

IV.

The facts upon which this claim is based are as follows:

(a) On or about April 11, 1942, Plaintiff J. H. Gallagher entered into an agreement in writing with Crown Zellerbach Corporation, a copy of which agreement is hereto attached, marked Exhibit "A", whereby said [1*] Crown Zellerbach Corporation granted to Plaintiff J. H. Gallagher the right, for the period beginning April 11, 1942, and extending to and including the 31st day of December, 1945, to take sand and gravel from a parcel of land described in Exhibit "A", which said parcel of land consists of and is a sand and gravel bar adjacent to and on the westerly side of the Willamette River,

(b) That by said agreement the said Crown Zellerbach Corporation further granted to Plaintiff J. H. Gallagher the right to construct a private road upon its premises adjacent to the said gravel bar for the purpose of transporting any sand and gravel produced to market,

(c) On or about April 13, 1942, the Plaintiff J. H. Gallagher and the Plaintiffs J. Ira McNutt and Earl L. McNutt entered into a written agreement, a copy of which is attached hereto, marked Exhibit "B", whereby the Plaintiff J. H. Gallagher agreed to do certain things and the Plaintiffs J. Ira McNutt and Earl L. McNutt agreed, among other things, to install bunkers, machinery and equipment on the gravel bar and to process sand and gravel from the bar,

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* Page numbering appearing at foot of page of original certified Transcript of Record.

(d) Subsequent to April 13, 1942, Plaintiffs expended over $10,000.00 in building a private road, a substational portion of which was located upon land owned by said Crown Zellerbach Corporation adjacent to said sand and gravel bar.

(e) Subsequent to the construction of said road, soldiers from Camp Adair, near Corvallis, Oregon, acting under instructions of their superior officers, hauled over 66,917 cubic yards of sand and gravel in Army trucks and other conveyances over Plaintiffs' road to Camp Adair where [2] they were used upon the roads and in connection with other work within the limits of the Camp Adair Reservation,

(f) That said use of Plaintiffs' road was made by Defendant with full knowledge of the fact that it was Plaintiffs' property, and

(g) That the reasonable and fair market value of the use of Plaintiffs' road was and is in excess of $7,500.00.

Wherefore, Plaintiffs pray that a judgment may be entered herein in their favor and against Defendant for $7,500.00 and costs and for such other and further relief as may to the court seem proper.

/s/ LAURENCE T. HARRIS,
HAMPSON, KOERNER,
YOUNG & SWETT,
/s/ JAMES C. DEZENDORF,

Attorneys for Plaintiffs. [3]

EXHIBIT A

This Agreement, Made and entered into this 11th day of April, 1942, by and between Crown Zellerbach Corporation, a corporation of the State of Nevada, whose principal business is that of manufacturing paper, hereinafter called the "Seller," and J. H. Gallagher of Corvallis, Oregon, hereinafter called the "Purchaser,"

Witnesseth:

The parties hereto, each in consideration of the agreements and the performance thereof on the part of the other, do agree:

1. Easement to Obtain Sand and Gravel: Subject to the terms and conditions hereof and subject to the Purchaser commencing active operations hereunder within Ninety (90) days from the date of this agreement, the Seller hereby grants the Purchaser the right and privilege of taking sand and gravel from the following described property:

A parcel of land in Township 9 South, Range 4 West of the Willamette Meridian, Polk County, Oregon, more particularly described as follows, to-wit:

Beginning at a point Twenty (20) chains due East of the Township line from the Southwest corner of Section 35 and running thence East to the West boundary line of Isaac N. Miller's D.L.C.; thence Northeasterly along the West boundary line of said claim to Northwest corner thereof; thence East along the North boundary line of said claim

to the West bank of the Willamette River; thence with the meanderings of said river to the mouth of the Luckimute River; thence up the South bank with the meanderings of said river to a point due North of the place of beginning, and thence to the place of beginning, in Section 35, together with all accretion thereto which under the laws of the State of Oregon may be owned by the Paper Company.

The precise place or places from which said Purchaser shall be permitted to take sand and gravel hereunder shall be designated by the Purchaser from time to time as required by the users of the material and the areas from which sand and gravel may be taken hereunder shall be staked out upon the ground by the Purchaser subject to approval of the Seller, and such areas may not exceed the quantity in yardage required by the Purchaser to maintain his stock piles or fill the contract requirements of the users of such sand and gravel by more than Twenty-five (25%) Percent; in other words, it is understood by and between the parties hereto that the Seller may sell sand and gravel from the above described property to other persons, firms or corporations and that the Purchaser shall not be permitted to stake out in advance for purchase hereunder more than Twenty-five (25%) Percent in excess of the yardage which he expects to place in stock piles or sell to the users of such material within a reasonable period of time.

2. Easement for Location of Equipment and Bunkers: Subject to the terms and conditions

hereof, the Seller hereby grants the Purchaser such rights of way for roads, telephone and transmission lines or other facilities as may be required upon its property together with the right and privilege of occupying and using one or more locations upon its property to be hereafter staked out upon the ground by the Purchaser with the approval of the Seller, to be used by the Purchaser for the construction and maintenance of bunkers and other improvements and/or stock piles reasonably necessary and/or convenient for the handling of sand and gravel from the lands of the Seller under the provision of this agreement. [5]

3. Manner of Operation: It is expressly understood that the Purchaser, in taking said sand and gravel under the provision of this agreement, shall not needlessly interfere with the use of the adjacent property of the Seller, or with any operation of the Seller, and particularly the Purchaser shall not needlessly interfere in any manner with the operations of any other person, firm or corporation who may contract for the purchaser of sand and gravel from the hereinabove described property of the Seller immediately adjacent to or abutting upon the area staked out by the Purchaser with the approval of the Seller and from which sand and gravel is being removed hereunder by the Purchaser; nor shall the Seller or any other person, firm or corporation obtaining sand and gravel from such adjacent property, needlessly interfere with the operations of the Purchaser.

4. Use of Roads and Rights of Way: As part consideration for the sand and gravel purchased hereunder by the Purchaser, the Purchaser hereby agrees that the Seller or its Assignees shall have the right to use any private roads constructed by or used by the Purchaser for obtaining the sand and gravel purchased hereunder; it being understood that such private roads shall be available to the Seller and any persons, firms or corporations to whom the Seller may sell sand and gravel from and herein described property, provided the Seller and/or such persons, firms or corporations shall reimburse the Purchaser on some reasonable basis for the use of such private roads; such reimbursement to be at a reasonable royalty rate on a per cubic yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads, taking into consideration the yardage of sand and gravel being hauled by the Purchaser and the yardage of sand and gravel to be hauled by the Seller or such persons, firms or corporations to whom it might sell sand [6] and gravel. In the event the Purchaser is not carrying on active operations hereunder, he shall not be required to maintain his private roads for the use of others while not operating. It being understood that during such period of time, the Seller or such other persons, firms or corporations to which it may sell sand and gravel from its property shall, if using the private roads of the Purchaser, maintain such private roads in a good

state of repair until such time as the Purchaser may resume active operations hereunder.

5. Price for Sand and Gravel: For each cubic yard of sand and/or gravel removed from the property of the Seller as hereinabove described, the Purchaser shall pay the Seller Eight (8c) Cents per cubic yard; such rate shall apply to both washed and/or unwashed sand and gravel whether used for road material or for other concrete construction or maintenance. Provided, however, that if the State of Oregon shall assert a claim to any of the sand and gravel sold hereunder, the Seller may, at its option, refund the payment made by the Purchaser for the quantity of sand and gravel claimed by the State and in this event, the Purchaser shall assume the full liability of making payment to the State of Oregon for the sand and gravel or other material removed from any property, the title to which may rest in the State of Oregon, or, if it elects so to do, the Seller may retain the amount received from the Purchaser for sand and gravel removed from land claimed by the State of Oregon and in this event the Seller shall assume the obligation of defending any suit prosecuted in the name of the State of Oregon, but in the event of a judgment in favor of the State of Oregon, the Seller shall not be obligated to pay to the State of Oregon a sum in excess of the amount received from the Purchaser for the sand and gravel or other material claimed by the State of Oregon, and the Purchaser agrees to pay to the [7] State of Oregon any judg-

ment in excess of the amount received by the Seller. The Purchaser shall have the privilege of joining with the Seller in the defense of any suit which may be brought in the name of the State of Oregon to collect a royalty on any of the sand and gravel or other material removed from the hereinabove described property.

6. Payment for Sand and Gravel: On or before the 10th day of each month during the term of this agreement, the Purchaser will render the Seller a statement of all sand and/or gravel which may have been removed by it from the land of the Seller during the preceding month based upon the tickets issued on each load of material and will remit with such statement such amount as may be due the Seller hereunder for sand and/or gravel removed during the preceding month. The Seller shall have the right to examine all books, records and accounts of the Purchaser to satisfy itself as to the accuracy of statements rendered by the Purchaser and the Purchaser hereby agrees that tickets bearing consecutive numbers will be used in maintaining a record of the quantity of sand and/or gravel removed from the property of the Seller and shall issue a numbered ticket for each load of material removed from the property; such ticket to also show the date issued and bear the signature of the truck driver or the name of the person using the material.

7. Quality: The quality of the sand and/or gravel sold and purchaser hereunder shall conform to the specifications required for ordinary road con-

struction ballast or for concrete use in paving, foundation work or other building construction. Any soil or other waste material not suitable for use by the Purchaser may be excavated and placed upon the adjacent land of the Seller at a location to be designated by the Seller; provided, however, that such waste material shall be spread upon the adjacent land as directed by the Paper Company. It [8] being understood that such waste material may not be placed upon that portion of the land of the Paper Company not staked out by the Purchaser and from which sand and gravel may be sold to others.

8. Term: The term of this agreement shall be from date hereof to and including the 31st day of December, 1945. Provided, however, that this agreement shall automatically terminate in the event the Purchaser shall fail to commence active operations hereunder on or before July 1, 1942. The Purchaser shall be presumed to have commenced active operations hereunder if he shall commence the construction of bunkers and other improvements required for the handling of sand and gravel from the lands of the Seller and shall engage in placing sand and gravel in stock piles or in making actual delivery of such material to any persons engaged in road construction, foundation work or other buiding construction incidental to or in connection with the so-called Albany-Corvallis Cantonment for which construction contracts are now being let by the U. S. Army Engineers. If the operations of the Purchaser hereunder are conducted satisfactory to

the Seller, this agreement may be extended from year to year by mutual agreement between the parties hereto.

9. Indemnity: The Purchaser will save and hold harmless the Seller from any loss, damage, charge or expense, arising or growing out of the performance, non-performance and/or mal-performance by the Purchaser of the obligations assumed by him under this agreement, or in the performance by him of the operations contemplated hereunder.

10. Default: Upon default of the Purchaser in the performance of any obligation by him assumed hereunder, after Thirty (30) Days' notice in writing from the Seller requesting performance hereunder, the Seller may, at its [9] discretion, cancel and terminate this agreement by declaration in writing to that effect to be served upon the Purchaser.

11. Removal of Property: Within thirty (30) days after the expiration or termination of this agreement, the Purchaser will remove his bunkers, improvements and/or personal property from the property of the Seller.

12. Taxes and Liens: The Purchaser will promptly pay any and all taxes which may be lawfully assessed and levied against any improvements of the Purchaser erected hereunder and/or against the business and/or operations of the Purchaser hereunder, and will not permit such taxes and/or assessments to become delinquent.

The Purchaser will promptly pay for all labor and material which may be employed or used in the

conduct of his operations hereunder and will not suffer nor permit any lien of any kind or nature to attach to the property of the Seller by reason thereof.

13. Assignment: The Purchaser will not assign this agreement nor any interest herein, nor sublet any operation hereunder without first obtaining the consent in writing of the Seller to such assignment or subletting. Provided, however, that the Purchaser may assign this agreement to McNutt Brothers of Eugene, Oregon for the purpose of carrying out the provisions of said agreement but such assignment shall not be effective unless and until McNutt Brothers execute a formal agreement in favor of the Seller in which they agree to assume and carry out all of the obligations of the Purchaser hereunder. Such agreement shall incorporate all of the conditions and provision of this agreement by reference therein and the attachment thereto of the executed counterparts of this agreement. Such agreement shall further provide that the said McNutt Brothers may not thereafter assign the agreement or any [10] interest therein, nor sublet any operation thereunder without first obtaining the consent in writing of the Seller to such assignment or subletting.

14. This Agreement Exclusive: All other verbal and/or written agreements between the parties hereto, concerning the subject matter hereof, are hereby cancelled, terminated and held for naught, and it is expressly understood that this agreement

shall be the sole and exclusive agreement between the parties, governing their relations with respect to the subject matter of this agreement. And it is further understood between the parties hereto that the rights of the Purchaser to obtain sand and gravel from the hereinabove described real property of the Seller is not exclusive and that the Seller retains the right to sell sand and gravel from its property to other persons, firms or corporations and the right to go upon its property for all purposes incidental thereto and may permit others to construct and maintain on its premises bunkers and other improvements reasonably necessary and/or convenient for the removal of sand and gravel, all of which may be removed over any private rights of way or roads owned by, used by or in the possession of the Purchaser and/or his successors or assigns as of or subsequent to the date of this agreement.

15. Purchaser as Independent Operator: It is understood by and between the parties hereto, that the Purchaser shall operate hereunder as an Independent Contractor and/or Operator and not as an employe of the Seller, and that any person or persons employed by the said Purchaser to aid or assist in carrying on the work under the conditions of this Agreement, shall be employes of the said Purchaser and not employes of the Seller. [11]

(a) The Purchaser further agrees to carry on the work to be performed under this Agreement, within the terms of and subject to the compensation and/or

industrial insurance act of the State of Oregon, and will pay any and all sums due and payable therefor to the Commission administering such Act.

(b) The Purchaser further agrees to pay or cause to be paid to any Federal, State, County, City, Municipal or other agency, authority or commission having jurisdiction in the premises, any compensation, fee, license, tax or other payments, including employers' and employes' payroll contribution or deduction, required to be paid by the Purchaser, his representatives, agents or employes, or by his Assignees, Sub-contractors or the representatives, agents or employes of such Assignees or Sub-contractors, under the provisions of any law, ordinance or regulation applicable thereto; and, it is expressly understood and agreed by the parties hereto, that the Seller shall not be held liable or responsible for the collection, deduction and/or payment of any sums required to be paid as aforesaid, and the Purchaser will save and hold harmless the Seller from any and all liability whatsoever, for the collection, deduction and/or payment of any sums required to be paid under any such law, ordinance or regulation.

(c) The Purchaser has qualified or hereby agrees to immediately qualify and will require his Assignees and/or any and all Sub-contractors to qualify, and remain qualified for the term of this Agreement, as an employer or employers under any and all Social Security laws or similar statutes, if permitted so to do voluntarily or otherwise. [12]

In Witness Whereof, the parties hereto have caused this Agreement to be executed as below subscribed.

CROWN ZELLERBACH
CORPORATION,
By LOUIS BLACK,
Chairman of the Board.

Attest:

D. J. GALEN,
Secretary.

Witnesses:

E. H. POST,
A. HEROUX.

J. H. GALLAGHER.

Witnesses:

BELLE K. GALLAGER,
ALCON E. J. GALLAGHER.

Approved as to form:

GRIFFITH, PECK,
PHILLIPS & NELSON,
By CLARENCE D. PHILLIPS.

Approved:

E. H. P.,
J. H. G. [13]

EXHIBIT B

Agreement

(Between McNutt Bros. and J. H. Gallagher)

This Agreement entered into between Earl L. McNutt and J. Ira McNutt, partners doing business under the firm name and style of McNutt Bros., and hereinafter for brevity sometimes referred to as "McNutt Bros.," and J. H. Gallagher, for brevity hereinafter sometimes referred to as "Gallagher,"

Witnesseth:

Recitals:

A. Gallagher has a letter from Crown Zellerbach Corporation dated March 13, 1942 committing that corporation to enter into a lease for the term of three (3) years, for the rentals and on the terms and conditions set forth in said letter, entitling Gallagher, his heirs or assigns, to remove sand and gravel from what is known as the Santiam Bar, which is located at a point near the confluence of the Santiam River with the Willamette River in Polk County, Oregon. It is contemplated that a formal lease will be executed by said Crown Zellerbach Corporation and said Gallagher. A copy of said lease, when made, shall be attached hereto and marked Exhibit A and made a part hereof.

B. A right of way has been granted by A. W. Crocker and his wife to Gallagher over what is known as the Crocker farm, and a copy of said grant of right of way is attached hereto, marked Exhibit B and made a part hereof.

C. L. M. Gossler and his wife have granted to Gallagher a right of way over the Gossler farm; and a copy of said grant of right of way is attached hereto, marked Exhibit C and made a part hereof.

D. The rights of way granted under and by force of Exhibits B and C afford ingress to and egress from said Santiam Bar. [14]

E. D. C. Crawford and his wife have granted to Gallagher, his heirs or assigns, a lease entitling Gallagher to take gravel and sand from an area inside lands owned by said Crawfords, for the price and on the terms and conditions set forth in said lease, and a copy of said lease is attached hereto, marked Exhibit D and made a part hereof.

F. Gallagher has incurred certain expenses in procuring said leases and rights of way.

G. Although the parties contemplate that most of the sand and gravel to be taken from the Santiam Bar will be used in connection with the development of the Cantonment now in the course of construction and situate between Corvallis and Monmouth, Oregon, nevertheless, it is also contemplated that McNutt Bros. will sell sand and gravel to any other party or parties desiring to buy for prices satisfactory to McNutt Bros.

Now, Therefore, in consideration of the premises and the mutual promises herein contained, and the moneys to be paid and things to be done as herein specified, it is agreed between the parties hereto as follows:

I.

Covenants by Gallagher

Gallagher covenants and agrees as follows:

1. That he will coincidently with the execution of these presents execute and deliver to McNutt Bros. assignments of:

(a) The Santiam Bar lease;

(b) The Crocker right of way;

(c) The Gossler right of way; and

(d) The Crawford lease.

2. That he will give such of his time and attention to sales of sand and gravel to be taken from said Santiam Bar and to the collection of the proceeds of such sales as [15] McNutt Bros. may from time to time request; and Gallagher shall be paid by McNutt Bros. for said services, on a sale basis, such amounts as the parties hereto may hereafter determine, together with his reasonable expenses incurred in the rendition of such services.

3. That he will endeavor to obtain leases on such other areas as are accessible to said Cantonment as McNutt Bros. may indicate, and if Gallagher does acquire such leases on such terms and for such prices as may be mutually satisfactory to him and McNutt Bros. he shall assign the same to McNutt Bros. on such terms as McNutt Bros. and Gallagher may hereafter agree.

II.

Covenants by McNutt Bros.

McNutt Bros. covenant and agree as follows:

1. That they will within a reasonable time fur-

nish and commence to install on the Santiam Bar, and with reasonable diligence complete the work of installing such equipment as will produce a minimum of seventy-five (75) yards more or less of sand and gravel per hour from said Santiam Bar.

2. That they will manage and carry on the work and business of operating said plant so to be installed until said Santiam Bar is exhausted, but in no event beyond the term of three years prescribed in the Santiam lease.

3. Nothing herein contained shall be so construed as to obligate McNutt Bros. to crush any gravel or any rock. However, it is agreed that if any rock or gravel is crushed in the operation of the plant on said Santiam Bar the parties hereto shall share in the profits on the same basis as herein prescribed.

III.

Mutual Covenants and Agreements

It is agreed between Gallagher and McNutt Bros. as follows:

1. McNutt Bros. shall be paid each month as rental for the use of all equipment installed by them an amount equal to Ten percent (10%) of the original cost of such equipment for the first shift of each calendar day and Five percent (5%) for each additional shift in such calendar day.

Gallagher shall be paid rentals on the same basis as the rentals paid to McNutt Bros. for all equipment furnished by Gallagher at the request of McNutt Bros. and used by McNutt Bros. in the operation of the Santiam Bar.

2. The cost of placing equipment in position shall be included as a part of the expense of operation.

3. McNutt Bros. shall be reimbursed for expenses hereafter incurred.

4. Gallagher shall out of the first net profits be reimbursed for all expenses incurred by him to date.

5. Gallagher may from time to time and as often as he desires so to do call upon the Bookkeeper for information as to the then condition of the books with reference to the Santiam Bar.

6. All equipment furnished by the McNutt Bros. shall at the end of the operations hereunder be returned to McNutt Bros. in as good working condition as the same were at the time of the installation, reasonable wear and tear and damage by the elements excepted.

7. It is expressly agreed that the matter of operating the Crawford bar, if the same is operated, is to be determined by the parties hereto at some future time.

8. After paying all the expenses of the operation of the Santiam Bar the net profits, if any, shall be divided as follows: On the first day of each calendar month beginning with August 1, 1942, and so long as the parties hereto operate hereunder, all surplus funds remaining after the payment of expenses shall be divided one-third to J. H. Gallagher, one-third to Earl L. McNutt and one-third to J. Ira McNutt; and upon completion of the operations hereunder, with reference to the Santiam Bar, the McNutt Bros. shall furnish to Gallagher a complete statement showing the operations hereunder.

9. These presents shall be binding upon and the benefits thereof shall inure to not only the respective parties hereto but also to the respective heirs, legal representatives and assigns of the parties hereto.

In Witness Whereof the parties hereto have subscribed these presents in triplicate this 13th day of April, 1942.

/s/ EARL L. McNUTT,
/s/ J. IRA McNUTT,
Partners doing business under the name of McNutt Bros.

/s/ J. W. GALLAGHER.

State of Oregon,
County of Benton—ss.

I, J. H. Gallagher, being first duly sworn, depose and say that I am one of the Plaintiffs in the above entitled action; and that the foregoing Complaint is true as I verily believe.

/s/ J. H. GALLAGHER.

Subscribed and sworn to before me this 20th day of August, 1946.

[Seal] /s/ W. M. BEALS,
Notary Public for Oregon.

My commission expires Dec. 2, 1949.

[Endorsed]: Filed Aug. 23, 1946. [18]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between Frank C. McColloch, attorney for Plaintiffs herein, and Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, attorneys for Defendant herein, that the defendant may, pursuant to approval of the Court, have 30 days from October 26, 1946, within which to answer or otherwise appear herein.

Dated at Portland, Oregon, this 23rd day of October, 1946.

/s/ FRANK C. McCOLLOCH,
Of Attorneys for Plaintiffs.

HENRY L. HESS,
United States Attorney
for the District of Oregon.

/s/ VICTOR E. HARR,
Assistant United
States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed October 29, 1946. [19]

[Title District Court and Cause.]

ORDER

Based upon stipulation of Frank C. McColloch, attorney for Plaintiff's herein, and Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, Attorneys for Defendant, it is hereby

Ordered that the defendant be, and it is hereby, granted 30 days from October 26, 1946, within which to answer or otherwise appear herein.

Dated at Portland, Oregon, this 29th day of October, 1946.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed October 29, 1946. [20]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between James C. Dezendorf, attorney for Plaintiffs herein, and Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, attorneys for Defendant herein, that the defendant may, pursuant to approval of the Court, have 30 days from November 26, 1946, within which to answer or otherwise appear herein.

Dated at Portland, Oregon, this 26th day of November, 1946.

/s/ JAMES C. DEZENDORF,
Attorney for Plaintiffs.

HENRY L. HESS,
United States Attorney
for the District of Oregon.

/s/ VICTOR E. HARR,
Assistant United
States Attorney,

Attorneys for Defendant.

[Endorsed]: Filed December 2, 1946. [21]

[Title of District Court and Cause.]

ORDER

Based upon stipulation of James C. Dezendorf, attorney for plaintiffs herein, and Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, attorneys for defendant, it is hereby

Ordered that the defendant be, and it is hereby granted 30 days from November 26, 1946, within which to answer or otherwise appear herein.

Dated at Portland, Oregon, this 2nd day of December, 1946.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed December 2, 1946. [22]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, the United States of America, and moves the Court for an order dismissing the above entitled cause wherein the plaintiffs seek recovery in the sum of $7,500.00 claimed to be due as compensation on a contract implied in fact for the reason that it appears on the face of the Complaint that there is a lack of allegations on jurisdictional matters as required by Section 268, U.S.C. Title 28.

Dated at Portland, Oregon, this 23rd day of December, 1946.

HENRY L. HESS,
United States Attorney
for the District of Oregon.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Motion to Dismiss, Civil No. 3242, by depositing in the United States Post Office at Portland, Oregon, on the 23rd day of December, 1946, duly certified copies thereof, enclosed in envelopes, with postage thereon prepaid addressed to Hampson, Koerner, Young &

Swett, Attorneys at Law, Pacific Building, Portland, Oregon, Attorneys for the Plaintiffs.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed December 23, 1946. [23]

[Title of Cause.]

ORDER CONTINUING MOTION TO DISMISS

Plaintiffs appearing by Mr. James C. Dezendorf, of counsel, defendant by Mr. J. Robert Patterson, Assistant United States Attorney.

It Is Ordered that defendant's motion to dismiss be and it is hereby continued to the time of pretrial hearing.

January 13, 1947. [24]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and for answer to the complaint on file herein alleges:

I.

Admits paragraph I, II, and III of the plaintiff's complaint.

II.

Admits sub-paragraphs (a), (b) and (c) of paragraph IV of the plaintiff's complaint.

III.

The defendant does not have information sufficient to form a belief as to the truth or falsity of sub-paragraphs (d) and (e) of paragraph IV of the plaintiffs' complaint and therefore denies the same.

IV.

Denies sub-paragraphs (f) and (g) of paragraph IV of plaintiffs' complaint.

Further and Separate Defense

The defendant alleges:

I.

That on the 14th day of May, 1945, in the District Court of the United States for the District of Oregon in an action of eminent domain proceedings by the United States against L. M. Gossler and in which these same plaintiffs, J. H. Gallagher, J. Ira McNutt and Earl L. McNutt intervened, said action being numbered Civil 1729 and being the same cause of action herein, said defendants therein and plaintiffs herein recovered judgment; that said [25] judgment was duly given and made against the plaintiffs therein defendant herein and among other things provided.

> "It Further Appearing to the Court that this matter having come on for trial on November 21, 1944 to determine the value of the remaining interest in and to said property, to-wit: the private roadway easement above referred to, and the plaintiff, United States of America, and the defendants, J. H. Gallagher and Belle K.

Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, co-partners doing business under the firm name and style of McNutt Bros., having stipulated in open Court by their respective Counsel that the jury, upon the trial, should fix the full market value of said defendants' interest in 1.8 miles of road leading to the Santiam Bar and including damage to said defendants' interest in said Bar arising out of a contract with Crown Zellerbach Corporation, dated April 11, 1942: * * *"

That said judgment has not been set aside, appealed, modified, or reversed, but that the same remains in full force and that the said judgment has been fully satisfied by payment by the defendant, United States of America.

Wherefore, defendant prays that the plaintiffs take nothing by this action and that this action be dismissed and that the defendant recover its costs and disbursements incurred herein.

HENRY L. HESS,
United States Attorney
for the District of Oregon.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Answer, Civil No. 3242, by depositing in the United States Post Office at Portland, Oregon, on the 15th day of January, 1947, duly certified copies thereof, enclosed in envelope with postage thereon prepaid, addressed to James C. Dezendorf, Attorney at Law, Pacific Building, Portland, Oregon, Attorney for the Plaintiffs.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed January 15, 1947. [26]

[Title of Cause.]

ORDER SETTING CAUSE FOR PRE-TRIAL

Now at this day It Is Ordered that this cause be and it is hereby set for pre-trial conference for Monday, February 10, 1947.

January 31, 1947. [27]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON PLEADINGS

Comes Now the defendants, United States of America by Henry L. Hess, and J. Robert Patter-

son, Assistant United States Attorney and moves the Court for Judgment on the pleadings in this cause for the reason that it appears from the pleadings and also from the Judgment which was entered in this same Court in the case of United States of America vs. L. M. Gossler et. al, Civil 1729, that this matter has been fully adjudicated and the prior judgment is a bar to this action.

Dated this 7th day of February, 1947.

HENRY L. HESS,
United States Attorney
for the District of Oregon.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Motion for Judgment on Pleadings, Civil No. 3242 by depositing in the United States Post Office at Portland, Oregon, on the 7th day of February, 1947, duly certified copies thereof, enclosed in envelope, with postage thereon prepaid, addressed to James C. Dezendorf, Attorney at Law, Pacific Building, Portland, Oregon, Attorney for the Defendants.

/s/ J. ROBERT PATTERSON,
Assistant United States
Attorney.

[Endorsed]: Filed February 7, 1947. [28]

[Title of Cause.]

ORDER SETTING CAUSE FOR TRIAL

Now at this day come the plaintiff by Mr. James C. Dezendorf, of counsel, and the defendant by Mr. J. Robert Patterson, Assistant United States Attorney. Whereupon this cause comes on to be heard upon defendant's motion for summary judgment herein, and the Court having heard the arguments of counsel reserves its decision to the time of trial. Pre-trial conference had, and

It Is Ordered that this cause be and it is hereby set for trial for Tuesday, March 11, 1947.

February 10, 1947. [29]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above entitled action came on regularly for a pre-trial conference before the undersigned judge of the above entitled court on Monday, January 6, 1947, at 10:30 o'clock a.m. Plaintiffs appeared by and through James C. Dezendorf, of their attorneys. Defendants appeared by and through J. Robert Patterson, Assistant United States Attorney.

Counsel for Plaintiffs asked leave to amend the Complaint by interlineation to insert the following paragraph between Paragraphs II and III, to be numbered II-A:

> "Each of the Plaintiffs is a citizen of the United States and has at all times borne true allegiance to the Government of the United

States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States."

The court allowed the amendment.

Agreed Facts

It was then agreed between counsel for Plaintiffs and defendant that the following facts were and are true:

(1) This action arises under the Act of March 3, 1887, c. 359, Sections 1, 2, 24 Stat. 505, as amended; U.S.C., Title 28, Sections 41(20) and 250(1), commonly known as the Tucker Act.

(2) Plaintiff J. H. Gallagher resides in the City of Corvallis, Benton County, Oregon; Plaintiffs J. Ira McNutt and Earl [30] L. McNutt reside in the City of Eugene, Lane County, Oregon.

(3) Each of the Plaintiffs is a citizen of the United States and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

(4) On or about April 11, 1942, Plaintiff J. H. Gallagher entered into an agreement in writing with Crown Zellerbach Corporation, a copy of which agreement is attached to the Complaint, marked Exhibit "A", whereby said Crown Zellerbach Corporation granted to Plaintiff J. H. Gallagher the right, for the period beginning April 11, 1942, and

extending to and including the 31st day of December, 1945, to take sand and gravel from a parcel of land described in Exhibit "A", which said parcel of land consists of and is a sand and gravel bar adjacent to and on the westerly side of the Willamette River.

(5) That by said agreement the said Crown Zellerbach Corporation further granted to Plaintiff J. H. Gallagher the right to construct a private road upon its premises adjacent to the said gravel bar for the purpose of transporting any sand and gravel produced to market.

(6) On or about April 13, 1942, the Plaintiff J. H. Gallagher and the Plaintiffs J. Ira McNutt and Earl L. McNutt entered into a written agreement, a copy of which is attached to the Complaint and marked Exhibit "B", whereby the Plaintiff J. H. Gallagher agreed to do certain things and the Plaintiffs J. Ira McNutt and Earl L. McNutt agreed, among other things, to install bunkers, machinery and equipment on the gravel bar and to process sand and gravel from the bar.

(7) Subsequent to April 13, 1942, Plaintiffs built a private road from the gravel bar to the county road, a substantial [31] portion of which was located on land owned by Crown Zellerbach Corporation, adjacent to said sand and gravel bar. The road also crossed land owned by L. M. Gossler and Alta L. Gossler and also land owned by A. W. Crocker and Agnes M. Crocker.

(8) Plaintiffs procured appropriate easements from the owners of the property upon which their road was constructed.

(9) On June 18, 1942, by appropriate order in a proceeding filed in this court, Defendant was granted possession of the property owned by L. M. Gossler and Alta L. Gossler and A. W. Crocker and Agnes M. Crocker, upon a portion of which Plaintiffs had constructed a portion of their road. Defendant has never procured, through legal proceedings, an order for possession of the property owned by Crown Zellerbach adjacent to the Santiam Bar, upon which Plaintiffs constructed the balance of their road.

(10) On October 5, 1942, Defendant filed a Declaration of Taking, accompanied by the deposit of appropriate funds, in connection with condemnation of the property owned by L. M. Gossler and Alta L. Gossler and A. W. Crocker and Agnes M. Crocker.

(11) Plaintiff J. H. Gallagher and his wife, Belle K. Gallagher, were joined as Defendants in the condemnation action relating to the Gossler land and during the course of said action plaintiffs Earl L. McNutt and J. Ira McNutt intervened in said condemnation action. None of the Plaintiffs were joined in the condemnation proceedings relating to the Crocker land.

(12) On November 21, 1944, the condemnation action to determine the value of Plaintiffs' interest in the Gossler land came on regularly for trial befor a jury in this court and at the commencement

thereof it was stipulated between counsel representing Plaintiffs herein: [32]

(Excerpt from Transcript of Testimony and Proceedings in Civil No. 1729—U. S. vs. Gossler, et al.)

Mr. Falk: May it please the Court—I will say this, Mr. Dezendorf, I stated yesterday, not in the presence of the reporter—and it may be that your purpose was to have a record—that so far as the Government is concerned I believe that testimony in this case showing the value of the entire road is proper, that I will not object to any testimony showing the value of the entire road.

Mr. Dezendorf: That does not go quite as far as we went yesterday, and perhaps, now that we have a reporter here, we had better get a clear understanding on it. So far as these defendants are concerned, we are willing to try, all in this one lawsuit, the value of the road and of our interest in the gravel bar. In other words, technically, you probably have only taken in this proceeding a portion of our road and probably will be limited to that if you wish to, but we are willing to try the whole interest of the value of the road and of the gravel in this one lawsuit.

Mr. Falk: I am, Mr. Dezendorf, willing to try the value of your interest in the entire road and the value of your interest in the gravel bar, and that is what I expected would be tried.

> The Court: Well, that relieves the Court of some of the responsibility, because with this stipulation I take it that the parties can stipulate to try any questions that they want to. This is a stipulation to try out certain questions which may not technically be in the case, and I shall treat it as that. As to the other question, my mind is not made up. I will have to make it up when the testimony is offered. [33]

(13) On November 24, 1944, the jury returned a verdict upon which judgment was duly entered in favor of Plaintiffs herein in the sum of $1,000.00 and Plaintiffs herein received the amount awarded them by said verdict and judgment as aforesaid.

(14) Between May 9, 1942, and June 20, 1942, Plaintiffs processed, washed, screened and stockpiled and were the owners of 13,743 cubic yards of sand and gravel which was then situated upon the Santiam Bar.

(15) Between May 9, 1942, and October 1, 1942, Plaintiffs sold and removed from said stockpiles and transported over their road 3,740 cubic yards of said stockpiled sand and gravel.

(16) Between July 1, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel from the Santiam Bar over the road constructed by Plaintiffs and paid to Plaintiffs for said use of their road the sum of $3,000.00.

(17) Between October 1, 1942, and August 19, 1944, the Defendant moved 66,643 cubic yards of

sand and gravel from the Santiam Bar over the road constructed by Plaintiffs.

(18) On November 18, 1942, Crown Zellerbach Corporation granted permission to the Defendant to remove sand and gravel from the Santiam Bar with the understanding that the rights of Plaintiffs under the agreement between Crown Zellerbach Corporation and J. H. [34] Gallagher of April 11, 1942, a copy of which is attached to the Complaint as Exhibit "A", would be protected. A duplicate original of the contract between Defendant and Crown Zellerbach Corporation is marked Exhibit 1 for identification.

Issues to Be Determined

I.

Whether the Defendant herein acquired ownership of that portion of Plaintiffs' road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land.

II.

Assuming the Defendant herein acquired ownership of that portion of Plaintiff's road which was constructed upon land owned by Crown Zellerbach Corporation, whether it acquired title to the Crown Zellerbach portion of the road prior to November 21, 1944.

III.

Assuming either (1) the Defendant did not acquire ownership of that portion of Plaintiffs' road

which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land, or (2) that defendant acquired title to the Crown Zellerbach Corporation portion of the road on November 21, 1944, whether plaintiffs have a valid claim against the defendant for hauling 66,643 cubic yards of sand and gravel over that portion of their road constructed upon the land owned by Crown Zellerbach Corporation.

IV.

Assuming Plaintiffs have a valid claim against the defendant for its use of that portion of their road constructed upon the land owned by Crown Zellerbach Corporation, the amount which Plaintiffs are entitled to recover from Defendantfl [35]

Exhibits

Plaintiffs' 1. Agreement dated November 18, 1942, between Crown Zellerbach Corporation and Defendant.

Defendant's 2. Judgment on the Verdict, Civil 1729.

Defendant's 3. Order Disbursing Funds and Final Judgment in Condemnation, Civil 1729.

Plaintiffs' 4. Agreement dated April 11, 1942, between Crown Zellerbach Corporation and J. H. Gallagher.

Plaintiffs' 5. Agreement dated April 13, 1942, between McNutt Bros. and J. H. Gallagher.

The foregoing Pre-trial Order having been duly agreed upon by the parties is hereby entered this 19th day of March, 1947.

CLAUDE McCOLLOCH,
District Judge.

Order agreeable:

/s/ JAMES DEZENDORF,
Of attorneys for Plaintiffs.

/s/ EDWARD B. TWINING,
Of attorneys for Defendant.

[Endorsed]: Filed March 19, 1947. [36]

[Title of Cause.]

JOURNAL ENTRY

Now at this day come the plaintiffs by Mr. James C. Dezendorf, of counsel and the defendant by Mr. Edward B. Twining, Assistant United States Attorney and Mr. Linus M. Fuller, Special Assistant to the United States Attorney. Whereupon this cause comes on to be tried before the Court, and the Court having heard the statements of counsel, evidence adduced and the arguments of counsel, will advise thereof.

March 19, 1947. [37]

In the District Court of the United States
for the District of Oregon

Civil No. 3242

J. H. GALLAGHER, J. IRA McNUTT and
EARL L. McNUTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION

It is doubtful, as Government counsel conceded at the trial, whether former adjudication bars the plaintiff. This leaves the equitable plea of estoppel for consideration. I think it is not inequitable for plaintiff to recover his cost less sums and credits previously received. That figures out:

Cost		$10,190.00
Less McDonald	$3,000.00	
Verdict Gossler case	1,000.00	
Plaintiff's own use	374.00	4,374.00
Judgment herein		$ 5,816.00

Dated March 21, 1947.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed March 21, 1947. [38]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the defendant, United States of America by Henry L. Hess, United States Attorney and Edward B. Twining and Linus M. Fuller, Assistant United States Attorneys and moves that the proposed findings of fact as heretofore submitted by counsel for the plaintiff in this case be amended as follows to-wit:

I.

That lines 3, 4, and 5 of paragraph VII on page 3 be stricken and deleted and that there be substituted therefor the following, to-wit:

> "Between April 13th and June 18th, 1942, Plaintiffs built a private road from the gravel bar to the county road, a distance of 1 8/10 miles, a substantial portion of which, or 6/10 of a mile was located on land owned by Crown Zellerbach Corporation," * * *

II.

That lines 16 and 17 of paragraph IX on page 3 be amended as follows, to-wit:

> "Upon a portion of which Plaintiffs had constructed 1 2/10 miles of their road."

And that line 20 of said paragraph be amended, towit:

> "The balance, or 6/10 of a mile of their road."

III.

That lines 7 and 8 of paragraph XII on page 4 be stricken and deleted and that there be substituted therefore the following, to-wit:

> "That the value of Plaintiffs interest in the entire road including the Crown Zellerbach section thereof and the value of Plaintiffs interest in the gravel bar should be tried in the condemnation action." [39]

IV.

That paragraph XVI on page 4 be stricken and deleted and that there be substituted therefor the following, to-wit:

> "Between July 1st, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel and paid to Plaintiffs the sum of $3,000.00 for the use of 18/10 miles of plaintiffs' road.

V.

That paragraph XVII on page 4 be stricken and deleted and that there be substituted therefor the following, to-wit:

> "Between October 1, 1942, and August 19, 1944, the defendant moved 66,643 cubic yards of sand and gravel from the Santiam Bar over 6/10 of a mile of Plaintiffs' road crossing the Crown Zellerbach Tract."

VI.

That paragraph XIX on page 5 be stricken and deleted and that there be substituted therefor the following, to-wit:

> "In the condemnation action, Civil 1729, on November 21, 1944, the value of plaintiffs' interest in the entire 1 8/10 miles of road including the Plaintiffs' interest in the 6/10 of a mile of road crossing the Crown Zellerbach Tract was submitted, considered and decided by the jury."

VII.

That paragraphs XX, XXI and XXII on page 5 be stricken.

VIII.

That there be added to the findings of fact the following paragraph, to-wit:

> "That the cost of the entire mile and 8/10 of a mile of road built by Plaintiff was $10,190, $1190 of which was paid by Plaintiff for easements crossing the Gossler and Crocker Tracts, that the Crown Zellerbach Section of the road is 6/10 of a mile in length, that the cost to Plaintiff of said 6/10 of a mile of road was $3,000.

IX.

That there be added to the findings of fact the following paragraph, to-wit:

"Plaintiffs received $3000 from Strong and

McDonald for the use of their road; they received $1000 in the Gossler condemnation [40] case and $374 as the fair market value of Plaintiffs' own use of the road, 1/3 of the total receipts, $4,374, should be apportioned to the Crown Zellerbach Section of the road.

Conclusions of Law

The defendants further move that the proposed conclusions of law as submitted by the plaintiff be amended as follows, to-wit:

I.

That paragraphs I, II, III and IV of conclusions of law be stricken and that the following be substituted therefor:

I.

"That the Stipulation of parties and the verdict of the jury in the condemnation action, Civil 1729 bars any recovery by plaintiff for use by defendant subsequent to June 18, 1942, of the Crown Zellerbach portion of plaintiffs' road.

II.

"That judgment should be entered herein in favor of defendant and that plaintiff take nothing by this action.

Dated this 3rd day of April, 1947.

/s/ EDWARD B. TWINING,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

Due and legal service of the within Objections to Proposed Findings of Fact is hereby accepted within the State and District of Oregon, on the 3rd day of April, 1947, by receiving a copy thereof duly certified to as true and correct copy of the original by Edward B. Twining, Assistant United States Attorney, for the District of Oregon.

/s/ ALFRED H. CORBETT,
Of Attorneys for Plaintiff.

[Endorsed]: Filed April 3, 1947. [41]

In the District Court of the United States
for the District of Oregon

Civil No. 3242

J. H. GALLAGHER, J. IRA McNUTT and EARL L. McNUTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above entitled action came on regularly for trial before the undersigned judge of the above entitled court on Wednesday, March 19, 1947, at 10:00

o'clock a.m. Plaintiffs appeared in person and by and through James C. Dezendorf, of their attorneys. Defendant appeared by and through Edward B. Twining and Linus M. Fuller, Assistant United States Attorneys. The Pre-trial Order, approved by the parties was signed and entered. After opening statements of counsel, the evidence of Plaintiffs and Defendant was heard and received. After both parties rested, arguments of counsel were heard, at the close of which the cause was submitted and the court took the matter under advisement. On March 21, 1947, the court handed down a Memorandum Opinion and in accordance therewith the court hereby makes and enters the following

Findings of Fact

I.

This action arises under the Act of March 3, 1887, c. 359, Sections 1, 2, 24 Stat. 505, as amended; U.S.C., Title 28, Sections 41(20) and 250(1), commonly known as the Tucker Act.

II.

Plaintiff, J. H. Gallagher resides in the City of Corvallis, Benton County, Oregon; Plaintiffs J. Ira McNutt and Earl L. McNutt reside in the City of Eugene, Lane County, Oregon. [42]

III.

Each of the Plaintiffs is a citizen of the United States and has at all times borne true allegiance to

the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

IV.

On or about April 11, 1942, Plaintiff J. H. Gallagher entered into an agreement in writing with Crown Zellerbach Corporation, a copy of which agreement is attached to the Complaint, marked Exhibit "A", whereby said Crown Zellerbach Corporation granted to Plaintiff J. H. Gallagher the right, for the period beginning April 11, 1942, and extending to and including the 31st day of December, 1945, to take sand and gravel from a parcel of land described in Exhibit "A", which said parcel of land consists of and is a sand and gravel bar adjacent to and on the westerly side of the Willamette Rriver.

V.

That by said agreement the said Crown Zellerbach Corporation further granted to Plaintiff J. H. Gallagher the right to construct a private road upon its premises adjacent to the said gravel bar for the purpose of transporting any sand and gravel produced to market.

VI.

On or about April 13, 1942, the Plaintiff J. H. Gallagher and the Plaintiffs J. Ira McNutt and Earl L. McNutt entered into a written agreement, a copy of which is attached to the Complaint and marked Exhibit "B", whereby the Plaintiff J. H.

Gallagher agreed to do certain things and the Plaintiffs J. Ira McNutt and Earl L. McNutt agreed, among other things, to install bunkers, machinery and equipment on the gravel bar and to process sand and gravel from [43] the bar.

VII.

Subsequent to April 13, 1942, Plaintiffs built a private road from the gravel bar to the county road, a substantial portion of which was located on land owned by Crown Zellerbach Corporation, adjacent to said sand and gravel bar. The road also crossed land owned by L. M. Gossler and Alta L. Gossler and also land owned by A. W. Crocker and Agnes M. Crocker.

VIII.

Plaintiffs procured appropriate easements from the owners of the property upon which their road was constructed.

IX.

On June 18, 1942, by appropriate order in a proceeding filed in this court, Defendant was granted possession of the property owned by L. M. Gossler and Alta L. Gossler and A. W. Crocker and Agnes M. Crocker, upon a portion of which Plaintiffs had constructed a portion of their road. Defendant has never procured, through legal proceedings, an order for possession of the property owned by Crown Zellerbach adjacent to the Santiam Bar, upon which Plaintiffs constructed the balance of their road.

X.

On October 5, 1942, Defendant filed a Declaration of Taking, accompanied by the deposit of appropriate funds, in connection with condemnation of the property owned by L. M. Gossler and Alta L. Gossler and A. W. Crocker and Agnes M. Crocker.

XI.

Plaintiff J. H. Gallagher and his wife, Belle K. Gallagher, were joined as Defendants in the condemnation action relating to the Gossler land and during the course of said action Plaintiffs Earl L. Gossler and J. Ira McNutt intervened in said condemnation action. None of the Plaintiffs were joined in the condemnation proceedings relating [44] to the Crocker land.

XII.

On November 21, 1944, a condemnation action to determine the value of Plaintiffs' interest in the Gossler land came on regularly for trial before a jury in this court and at the commencement thereof it was stipulated between counsel then representing the parties as appears on page 3a of the Pre-trial Order.

XIII.

On November 24, 1944, the jury returned a verdict upon which judgment was duly entered in favor of Plaintiffs herein in the sum of $1,000.00 and Plaintiffs herein received the amount awarded them by said verdict and judgment as aforesaid.

XIV.

Between May 9, 1942, and June 20, 1942, Plaintiffs processed, washed, screened and stockpiled and were the owners of 13,743 cubic yards of sand and gravel which was then situated upon the Santiam Bar.

XV.

Between May 9, 1942, and October 1, 1942, Plaintiffs sold and removed from said stockpiles and transported over their road 3,740 cubic yards of said stockpiled sand and gravel.

XVI.

Between July 1, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel from the Santiam Bar over the road constructed by Plaintiffs and paid to Plaintiffs for said use of their road the sum of $3,000.00.

XVII.

Between October 1, 1942, and August 19, 1944, the Defendant moved 66,643 cubic yards of sand and gravel from the Santiam Bar over the road constructed by Plaintiffs.

XVIII.

On November 18, 1942, Crown Zellerbach Corporation granted [45] permission to the Defendant to remove sand and gravel from the Santiam Bar

with the understanding that the rights of Plaintiffs under the agreement between Crown Zellerbach Corporation and J. H. Gallagher of April 11, 1942, a copy of which is attached to the Complaint as Exhibit "A", would be protected.

XIX.

Plaintiffs' claim presented herein for the reasonable and fair market value of the use by the Government of their road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land.

XX.

Defendant was fully advised of Plaintiffs' interest in their road at the time said road was used by it in hauling 66,643 cubic yards of sand and gravel thereon and Defendant's use thereof was not made under a claim of ownership thereof.

XXI.

Plaintiffs' road cost $10,190.00; they received $3,000.00 from Strong and McDonald for the use thereof; they received $1,000.00 in the Gossler condemnation case, and $374.00 is the fair market value of Plaintiffs' own use of the road.

XXII.

The reasonable and fair market value of Defendant's use of Plaintiffs' road was and is the sum of $5,816.00.

Based upon the foregoing Findings of Fact, the court hereby makes and enters the following:

Conclusions of Law

I.

Defendant did not acquire ownership of that portion of Plaintiffs' road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the [46] Gossler land and the claim asserted by Plaintiffs herein has not been submitted, considered or fully decided in any other action or proceeding.

II.

Plaintiffs have a valid claim against Defendant for the reasonable and fair market value of the use made by Defendant of their road in hauling 66,643 cubic yards of sand and gravel thereon.

III.

Defendant used Plaintiffs' road under circumstances warranting the implication of a contract implied in fact to pay Plaintiffs the reasonable and fair market value of the use thereof.

IV.

That judgment should be entered herein favor of Plaintiffs and against Defendant for $5,816.00.

V.

The Pre-trial Order should be and it is hereby on the Court's own motion and in the interest of manifest justice amended to accord with these findings, conclusions and judgment.

Based upon the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed That Plaintiffs be and they hereby are awarded judgment against Defendant for the sum of $5,-816.00.

Dated this 4th day of April, 1947.

/s/ CLAUDE McCOLLOCH,
District Judge.

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Findings of Fact, Conclusions of Law and Judgement by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 24th day March, 1947.

/s/ EDWARD B. TWINING,
Of Attorneys for Defendant.

[Endorsed]: Filed April 4, 1947. [47]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND FOR AMENDMENT OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Comes Now the United States of America, defendant in the above-entitled cause, by Henry L. Hess, United States Attorney for the District of Oregon, and Edward B. Twining, Assistant United States Attorney, and moves the Court for a new trial for the following reasons:

1. The Court erred in that the Court did not find that Plaintiffs' action in this case was res adjudicata by reason of decision in United States vs. Gossler, et al., Civil No. 1729, and the stipulation of the parties and the verdict of the jury in said case.

2. The Court erred in that the Court did not find Plaintiffs were estopped from recovering in this action by the proceeding in the United States vs. Gossler, et al., Civil No. 1729 and the stipulation of the parties and the verdict of the jury in said case.

3. The Court erred in basing judgment in this case upon testimony of the cost of road construction of a road not within the issues formulated in this case and the cost of construction of said road during a period of time not within the issues formulated in this case.

4. The Court erred in entering judgment for the Plaintiffs in this case in that no evidence was presented by Plaintiffs as to the reasonable and fair market value of the use of Plaintiffs' road and particularly, that no such evidence was presented pertaining to a period of time within the formulated issues in this case.

Defendant, United States of America, Further Moves the Court for Amendment of Findings of Fact, Conclusions of Law and Judgment heretofore filed in this case, in the following particulars, to-wit: [48]

I.

That lines 3, 4, and 5 of paragraph VII on page 3 be stricken and deleted and that there be substituted therefore the following, to-wit:

"Between April 13th and June 18th, 1942, Plaintiffs built a private road from the gravel bar to the county road, a distance of 1 8/10 miles, a substantial portion of which, or 6/10 of a mile was located on land owned by Crown Zellerbach Corporation," * * *

II.

That lines 16 and 17 of paragraph IX on page 3 be amended as follows, to-wit:

"Upon a portion of which Plaintiffs had constructed 1 2/10 miles of their road."

And that line 20 of said paragraph be amended, to-wit:

"The balance, or 6/10 of a mile of their road."

III.

That lines 7 and 8 of paragraph XII on page 4 be stricken and deleted and that there be substituted therefore the following, to-wit:

"That the value of Plaintiffs' interest in the entire road including the Crown Zellerbach section thereof and the value of Plaintiffs' interest in the gravel bar should be tried in the condemnation action."

IV.

That paragraph XVI on page 4 be stricken and deleted and that there be substituted therefore the following, to-wit:

"Between July 1st, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel and paid to Plaintiffs the sum of $3,000.00 for the use of 18/10 miles of Plaintiffs' road.

V.

That paragraph XVII on page 4 be stricken and deleted and that there be substituted therefor the following, to-wit:

"Between October 1, 1942, and August 19, 1944, the defendant moved 66,643 cubic yards

of sand and gravel from the Santiam Bar over 6/10 of a mile of Plaintiffs' road crossing the Crown Zellerbach Tract." [49]

VI.

That paragraph XIX on page 5 be stricken and deleted and that there be substituted therefor the following, to-wit:

"In the condemnation action, Civil 1729, on November 21, 1944, the value of Plaintiffs' interest in the entire 18/10 miles of road including the Plaintiffs' interest in the 6/10 miles of a road crossing the Crown Zellerbach Tract was submitted, considered and decided by the jury."

VII.

That paragraphs XX, XXI and XXII on page 5 be stricken.

VIII.

That there be added to the findings of fact the following paragraph, to-wit:

"That the cost of the entire mile and 8/10 of a mile of road built by Plaintiff was $10,190, $1190 of which was paid by Plaintiff for easements crossing the Gossler and Crocker Tracts, that the Crown Zellerbach Section of the road is 6/10 of a mile in length, that the cost to Plaintiff of said 6/10 of a mile of road was $3,000.

IX.

That there be added to the findings of fact the following paragraph, to-wit:

> "Plaintiffs received $3000 from Strong and McDonald for the use of their road; they received $1000 in the Gossler condemnation case and $374 as the fair market value of Plaintiffs' own use of the road, total $4,374, ⅓ of which, or $1458 should rightly be apportioned to the Crown Zellerbach Section of the road, with the result that the sum of $1542 is the amount of road costs which Plaintiffs have not heretofore recovered.

Conclusions of Law

The defendants further move that the proposed conclusions of law as submitted by the Plaintiff be amended as follows, to-wit:

I.

That paragraphs I, II, III, IV and V of Conclusions of law be stricken and that the following be substituted therefor: [50]

I.

> "That the Stipulation of parties and the verdict of the jury in the condemnation action, Civil 1729 bars any recovery by plaintiff for use by defendant subsequent to June 18, 1942, of the Crown Zellerbach portion of Plaintiffs' road.

II.

"That judgment should be entered herein in favor of defendant and that plaintiff take nothing by this action.

Dated at Portland, Oregon, this 11th day of April, 1947.

HENRY L. HESS,
United States Attorney
for the District of Oregon.

/s/ EDWARD B. TWINING,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

Due and legal service of the within Motion is hereby accepted within the State and District of Oregon, on the 11th day of April, 1947, by receiving a copy thereof duly certified to as true and correct copy of the original by Edward B. Twining, Assistant United States Attorney for the District of Oregon.

HAMPSON, KOERNER,
YOUNG & SWETT,

By CLARENCE J. YOUNG,
Attorney for Plaintiff.

[Endorsed]: Filed April 11, 1947. [51]

[Title of District Court and Cause.]

ORDER

The motions of Defendant to amend the findings and conclusions and for a new trial came on regularly before the undersigned judge of the above entitled court on Monday, May 5, 1947, at 11 o'clock a.m. Plaintiffs appeared by and through James C. Dezendorf, of their attorneys. Defendant appeared by and through Edward B. Twining, Assistant United States Attorney. Following arguments of counsel, the court took the matter under advisement. Due consideration having been given to the motions and the court being now fully advised.

It Is Hereby Ordered that Defendant's motions to amend the findings and conclusions and for a new trial be and the same hereby are denied in all respects.

Dated at Portland, Oregon, this 22nd day of May, 1947.

CLAUDE McCOLLOCH,
District Judge.

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Order by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 6th day of June, 1947.

EDWARD B. TWINING,
Asst. U. S. Atty.,
Attorney for Defendant.

[Endorsed]: Filed June 7, 1947. [52]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To J. H. Gallagher, J. Ira McNutt and Earl L. McNutt, Plaintiffs above named, and James C. Dezendorf, their attorney:

You and each of you, will please take notice that the defendant, United States of America, appeals to the United States Circuit Court of Appeals for the Ninth Judicial District from that certain judgment in the above entitled cause made and entered on the 4th day of April, 1947, by the Honorable Claude McColloch, Judge of the above-entitled court, wherein the plaintiffs recovered judgment against the defendant in the sum of $5,816.00, and defendant appeals from the order made and entered on the 22nd day of May, 1947, by the Honorable Claude McColloch in connection with said judgment denying defendant's Motion for New Trial and for Amendment of Findings of Fact, Conclusions of Law and Judgment.

HENRY L. HESS,
United States Attorney
for the District of Oregon.

By /s/ EDWARD B. TWINING,
Assistant United States
Attorney.

[Endorsed]: Filed Aug. 19, 1947. [53]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The United States of America, appellant in the above entitled case, designates the complete record and all of the proceedings and evidence, including exhibits to the complaint, to be included in the record on appeal.

Respectfully submitted,
/s/ HENRY L. HESS,
United States Attorney
for the District of Oregon.

United States of America,
District of Oregon—ss.

I, Edward B. Twining, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Designation of Record on Appeal on the Plaintiffs herein, by depositing in the United States Post Office at Portland, Oregon, on the 22nd day of August, 1947, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to James C. Dezendorf, Attorney at Law, Pacific Building, Portland, Oregon, Attorney for Plaintiffs.

/s/ EDWARD B. TWINING,
Assistant United States
Attorney.

[Endorsed]: Filed Aug. 22, 1947. [54]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON

The United States of America, defendant-appellant, makes the following statement of points on which it will rely on appeal:

(1) The district court erred in not holding that the entire interests of the plaintiffs-appellees in the road were adjudicated in the condemnation action, United States vs. Gossler et al., Civil No. 1729, and that they are estopped from maintaining this action for the fair market value of the use of the road.

(2) The district court erred in holding that the claim presented herein for the reasonable and fair market value of the use by the Government of the road belonging to plaintiffs-appellees was not submitted, considered or fully decided in the case of United States vs. Gossler et al., Civil No. 1729.

(3) The district court erred in holding that the plaintiffs-appellees have a valid claim against the United States for the reasonable and fair market value of its use for hauling 66,643 cubic yards of sand and gravel over the road. [55]

(4) The district court erred in holding that the circumstances under which the United States used the road were such as to warrant the implication of a contract to pay the reasonable and fair market value of the use thereof.

(5) The district court erred in rendering a judgment in favor of plaintiffs-appellees based on the cost of construction of the entire road, less the amount previously received for the use, as the reasonable and fair market value of the use of one-third of the road for hauling 66,643 cubic yards of sand and gravel.

(6) The district court erred in admitting evidence of the construction cost of the entire road.

(7) The district court erred in ignoring the undisputed evidence that the portion of the road included in the pleadings could not have cost in excess of $3,000.

(8) The district court erred in giving judgment of $5,816 for the use by defendant-appellant in hauling 66,643 cubic yards of sand and gravel over .6 mile of road.

HENRY L. HESS,
United States Attorney.

/s/ EDWARD B. TWINING,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

Service of the within Statement of Points to Be Relied Upon is hereby accepted within the State and District of Oregon, on the 4th day of September, 1947, by receiving a copy thereof duly certified to as a true and correct copy of the original by Edward B. Twining, Assistant United States Attorney for the District of Oregon.

/s/ JAMES C. DEZENDORF,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 4, 1947. [56]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS

On Motion of the Defendant, and appellant, herein, and good cause appearing therefor, it is hereby ordered,

That all of the original exhibits in the above case be transmitted to the Circuit Court of Appeals, in connection with the appeal of this case.

Dated this 12th day of September, 1947.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Sept. 12, 1947. [57]

[Title of District Court and Cause.]

DOCKET ENTRIES

1946

Aug. 23—Filed complaint.

Aug. 23—Issued summons, to marshal.

Aug. 28—Filed summons with Marshal's return.

Oct. 29—Filed stipulation for order extending time to answer.

Oct. 29—Filed and entered order extending time to answer (30 days after Oct. 26). McC.

Dec. 2—Filed stipulation for order allowing deft. 30 days from Nov. 26 to appear.

Dec. 2—Filed and entered order allowing deft. 30 days from Nov. 26 to appear. McC.

Dec. 23—Filed motion to dismiss.

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Jan. 13—Entered order continuing motion to dismiss to time of pre-trial hearing. McC.

Jan. 15—Filed answer.

Jan. 31—Entered order setting for pre-trial on Feb. 10, 1947. McC.

Feb. 7—Filed defendant's motion for judgment on pleadings.

Feb. 10—Entered order reserving deft's. motion for judgment on the pleadings to the time of trial, pre-trial hearing had and order setting for trial on March 11, 1947, 10 a.m. notified. McC.

Feb. 17—Entered order resetting for trial on March 18, 1947, notified. McC.

Feb. 21—Entered order resetting for trial on March 19, 1947, notified. McC.

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Mar. 5—Filed praecipe, U. S. Atty., 2 subpoenas.
Mar. 5—Issued 2 subpoenas—to marshal.
Mar. 17—Filed supoena with return.
Mar. 19—Record of trial before court and order taking under advisement. McC.
Mar. 20—Filed subpoena with marshal's return.
Mar. 19—Filed and entered pre-trial order. McC.
Mar. 21—Filed exhibits 1 to 5 inclusive (in file).
Mar. 21—Filed memorandum opinion. McC.
Apr. 3—Filed objections of deft. to proposed findings and conclusions.
Apr. 4—Filed and entered Findings of Fact, Conclusions of Law and Judgment notices. McC.
Apr. 11—Filed defendant's motion for a new trial, etc.
May 5—Record of hearings on motion for a new trial, to amend findings, etc., argued and taken under advisement. McC.
May 22—Filed transcript of proceedings of March 19 and May 5, 1947.
May 22—Entered order denying motion for a new trial and for amendment of Findings of Fact, Conclusions of Law and Judgment notices. McC.
June 7—Filed above order.
July 5—Filed judgment roll.
Aug. 19—Filed notice of appeal by U. S. [58]
Aug. 19—Mailed copy notice of appeal to Attorney Harris at Eugene, Ore., and copy to Koerner, Young & Swett, Portland, Ore.

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Aug. 22—Filed designation of contents of record.

Sept. 4—Filed statement of points to be relied upon.

Sept.12—Filed and entered order transmitting original exhibits to circuit court of appeals. McC. [59]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I. Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 60 inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 3242 in which United States of America is defendant and appellant and J. H. Gallagher, J. Ira McNutt and Earl L. McNutt are plaintiffs and appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of proceedings dated March 19 and May 5, 1947, and original exhibits 1 to 5 inclusive.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 19th day of September, 1947.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy [60]

In the District Court of the United States
for the District of Oregon

Civil No. 3242

J. H. GALLAGHER, J. IRA McNUTT and EARL L. McNUTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, March 19, 1947

Before: Honorable Claude McColloch,
Judge.

Appearances:

Mr. James C. Dezendorf (Koerner, Young, Swett & McColloch), of attorneys for plaintiffs.

Mr. Edward B. Twining, Assistant United States Attorney, attorney for defendant.

Mr. Linus M. Fuller, Special Assistant United States Attorney, attorney for defendant.

Court Reporter: Ira G. Holcomb. [1*]

Mr. Dezendorf: May it please the Court, I would like to hand up the proposed pre-trial order which, as I understand, is agreeable to the Government. I did not have it clipped together before I came up here because there were two pages which had to be inserted after I got up here. I left the end of the order open because I did not know whether the Government had any exhibits which it proposed to introduce. It will be satisfactory with me, and I assume with opposing counsel, that the order may be completed when the exhibits are made known and identified. The issues and admitted facts are set forth, however, in the order.

Mr. Twining: That is right.

The Court: I will sign it. You may complete it later.

Mr. Dezendorf: I haven't the place yet typed for signatures, but will complete it.

The Court: It may be deemed signed as of now.

Mr. Dezendorf: There is referred to in the pre-trial order, as Plaintiffs' Exhibit No. 1, the contract between the Crown Zellerbach Corporation and

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* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

the Government of November 18, 1942, which I would like to have identified and which I would like to offer in evidence at this time.

Mr. Twining: No objection.

(Agreement between Crown Zellerbach Corporation and the United States of [2] America, dated November 18, 1942, thereupon received in evidence and marked Plaintiffs' Exhibit No. 1.)

PLAINTIFFS EXHIBIT No. 1

[Letterhead Crown Zellerbach Corporation]

November 18, 1942.

Colonel Gordon H. McCoy,
Post Commander, Camp Adair,
Camp Adair, Oregon.

Dear Colonel McCoy:

Permission is hereby granted the U. S. Army to remove river-run sand and gravel from our property along the Willamette River in Section 35, Township 9 South, Range 4 West of the W.M., Polk County, Oregon, for the duration of the present war emergency at a price of 2.5c per cubic yard.

It should be understood, of course, that the rights of Mr. J. H. Gallagher of Corvallis, Oregon under an agreement of April 11, 1942 between the said Gallagher and the undersigned Corporation, a copy of which agreement is in your possession, will be protected. You are advised, however, that Mr. Gal-

lagher has not staked out on the ground any areas from which he intends to remove yardage to maintain his stock piles or fill contract requirements and we therefore consider that you would be free to take material from any part of the area covered by the gravel and sand deposit except that portion on which Mr. Gallagher's screening structure is located and/or the areas covered by his stock piles of screened material.

If this offer has your acceptance, we understand that requisitions will be placed with our Corporation as material may be required and that payment for the material will be based upon yardage removed either by cross-sectioning the area or by a yardage calculation based upon the truck loads hauled. Either method of calculating the quantity will be satisfactory to us.

If the above is satisfactory and you feel free to do so, we shall appreciate your acceptance on the duplicate of this letter and the return of such duplicate to us.

Appreciating the courtesies extended by yourself, Major E. A. Shafer and Captain C. B. Forsman on the occasion of the writer's visit to Camp Adair yesterday, we are

Very truly yours,

CROWN ZELLERBACH
CORPORATION,

By /s/ J. R. FRUM,
Assistant Vice-President.

J. R. Frum/H

Accepted this 19th day of November, 1942. For the Post Commander.

By /s/ CARL B. FORSMAN,
Capt. F. A.,
Asst. Executive Officer.

[Endorsed]: Filed U.S.C.C.A. Sept. 22, 1947.

Mr. Dezendorf: The issues are fairly well defined by the pre-trial order and, for the purpose of getting the issues before your Honor, I would like to summarize briefly the agreed facts.

This, of course, is an action under the Tucker Act, brought by Mr. Gallagher and the McNutt brothers, Gallagher residing in Corvallis and the McNutt brothers in Eugene.

On or about the 11th day of April, 1942, the plaintiff, Gallagher, entered into an agreement with the Crown Zellerbach Corporation, a copy of which is attached to the complaint. At this point, do you think it would be advisable to put in the record the original of the contract? It was in the other case.

Mr. Twining: The contract between Crown Zellerbach and Gallagher?

Mr. Dezendorf: Yes. I can produce it later. This contract permitted Gallagher to take sand and gravel from the so-called Santiam Bar and to construct a road on land owned by the Crown Zellerbach Corporation in order to get the gravel to the county road. There are also two other ownerships

between the bar and the road, one being the Gossler land and the other the Crocker land.

Appropriate easements were obtained by Gallagher from the Crockers and the Gosslers and the road was then constructed from the bar to the county road.

On June 18, 1942, which was after the road had been built, by an appropriate order in proceedings filed in this court, the Government was granted possession of the Crocker and Gossler land, but not of the Crown Zellerbach land. It was not requested and was not allowed. No order of possession was ever entered as to the Crown Zellerbach portion of the road.

On October 5th, appropriate declarations of taking were filed in the condemnation action brought to acquire the Gossler and Crocker lands. Mr. Gallagher was joined as a defendant in the Gossler case and, thereafter, the McNutt brothers intervened in that action, but neither the plaintiff Gallagher nor the plaintiffs McNutt were made parties defendant in the Crocker case, although there was an assignment of record in favor of Gallagher.

On November 21, 1944, the action to assess the value of Gallagher's and McNutt brothers' interest in the Gossler land came on for trial. The pre-trial order contains the exact stipulation that was then entered into between counsel representing the Government and counsel representing Gallagher and McNutts. I think it might be well to read it. [4] It is very short.

"Mr. Falk: May it please the Court—I will say this, Mr. Dezendorf, I stated yesterday, not in the presence of the Reporter—and it may be that your purpose was to have a record—that so far as the Government is concerned I believe that testimony in this case showing the value of the entire road is proper, that I will not object to any testimony showing the value of the entire road.

"Mr. Dezendorf: That does not go quite as far as we went yesterday, and perhaps, now that we have a Reporter here, we had better get a clear understanding on it. So far as these defendants are concerned, we are willing to try, all in this one lawsuit, the value of the road and of our interest in the gravel bar. In other words, technically, you probably have only taken in this proceeding a portion of our road and probably will be limited to that if you wish to, but we are willing to try the whole interest of the value of the road and of the gravel in this one lawsuit.

"Mr. Falk: I am, Mr. Dezendorf, willing to try the value of your interest in the entire road and the value of your interest in the gravel bar, and that is what I expected would be tried.

"The Court: Well, that relieves the Court of some of the responsibility, because with this stipulation I take it that the parties can stipulate to try any questions that [5] they want to. This is a stipulation to try out certain questions which may not technically be in the case, and I

shall treat it as that. As to the other question, my mind is not made up. I will have to make it up when the testimony is offered."

On November 24th, the third day of trial, the jury returned a verdict on which judgment was entered in favor of Gallagher and McNutt brothers for $1,000.

At this point, I would like to refer to the Court's instructions which have been transcribed. I do not know whether they are a part of this record or not, but I would be willing to make my copy available for that purpose, if it is needed.

Under the instructions the only question which was submitted, as I interpret it, was the value of the Gallagher and McNutt brothers' interest in the Gossler and Crocker lands, not in the Crown Zellerbach land. Referring to the instructions to the jury, the following appears:

> "On June 18, 1942, the Government took the Crocker and Gossler lands and the Gallagher and the McNutt brothers' interest therein. As a result of this taking of these interests the United States is required to pay just compensation."

Then, the Court went on to define what fair market value is and, on page 6 of the instructions the Court said [6] this: "The sole consideration for you is the fair market value of the Gallagher and McNutt property interests. You will, then, not take into consideration in your deliebrations the cost of construction of the road over either of the pieces of property, or the purchase price of the right-of-way,

but only the fair market value of the interest of McNutt and Gallagher as of the date June 18, 1942."

Because Judge Harris and I felt that the issues which we intended to be tried were not submitted, we filed a motion for a new trial following judgment and the verdict, and Judge Fee rendered an opinion on April 2, 1945, denying the motion for new trial but leaving open the question as to whether the interests of Gallagher and the McNutts in the Crown Zellerbach Corporation portion of the road had actually been acquired, leaving that question open for determination in another lawsuit.

Also, at the time the motion for the new trial was argued, Judge Fee made this statement—this is on December 18, 1944—"I think the Court will not pass on the question whether or not the Tucker Act cases were involved in this matter, and whether the verdict was on those cases or not. That would be a question in another lawsuit."

Then, referring to the Gossler case, the Court said: "As I take it, that involved simply the trial as to the value of this easement over a particular piece of land. [7] * * * It is true that the Court did not submit to the jury the value of the easement over other lands, because of the fact that if you did not have an easement over this land you were not entitled to be paid."

I confess it has been a little bit difficult for me to understand exactly what Judge Fee had in mind. However, from the opinion on motion for a new trial and what he said at the time, following the conclusion of the motion for new trial, it appeared to

Judge Harris and to me that the question of the amount, if any, which Gallagher and the McNutt brothers were entitled to recover for the use which the Government made of the Crown Zellerbach land was still open for consideration.

The admitted facts will show—and they are contained in the pre-trial order—that Gallagher and the McNutt brothers hauled out over their road only 3,740 cubic yards of gravel; between July 1, 1942, and September 16, 1942, Strong & McDonald moved 68,203 cubic yards of sand and gravel over the road and paid to Gallagher $3,000 for that use; between October 1, 1942, and August 19, 1944, the Government moved 62,643 cubic yards of sand and gravel from the Santiam Bar over plaintiffs' road and paid the plaintiffs nothing for its use of the road.

The contract between the Government and the Crown Zellerbach Corporation, dated November 18, 1942, which was [8] about the time the Government started to haul gravel out over this road, is very interesting.

It is addressed to Colonel Gordon H. McCoy, Post Commander, Camp Adair, Oregon, and reads:

"Dear Colonel McCoy:

"Permission is hereby granted the U. S. Army to remove river run sand and gravel from our property along the Willamette River," and then describing the property, which is the Santiam Bar.

"It should be understood, of course, that the rights of Mr. J. H. Gallagher of Corvallis, Oregon, under an agreement of April 11, 1942, between the said Gallagher and the undersigned corporation, a copy of which agreement is in your possession, will be protected."

Then the letter goes on to say: "If this offer has your acceptance, we understand that requisitions will be placed with your corporation as material may be required and that payment for the material will be based upon yardage removed either by cross-sectioning the area or by a yardage calculation based upon the truckloads hauled," and so forth.

This document contains the following: "Accepted this 19th day of November, 1942. For the Post Commander: By Carl B. Forsman, Captain F. A., Asst. Executive Officer."

The original contract of April 11, 1942, between the Crown Zellerbach Corporation and Gallagher contains this [9] provision which, in my judgment, supports the present claim for use by the Government of the road. This is sub-paragraph 4 of the agreement between Crown Zellerbach Corporation and Gallagher:

> "As part consideration for the sand and gravel purchased hereunder by the purchaser, the purchaser hereby agrees that the seller or its assigns shall have the right to use any private roads constructed by or used by the purchaser for obtaining the sand and gravel purchased hereunder; it being understood that such private roads shall be available to the sellers and any persons, firms or corporations to whom the seller may sell sand and gravel from the herein described property, provided the seller and/or such persons, firms or corporations shall reimburse the purchaser on some reasonable basis for the use of such private

roads; such reimbursement to beat a reasonable royalty rate on a per-cubic-yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads, taking into consideration the yardage of sand and gravel being hauled by the purchaser and the yardage of sand and gravel to be hauled by the seller or such persons, firms or corporations to whom it might sell sand and gravel."

The contract between the Crown Zellerbach Corporation and the Army shows that the Army had a copy of this [10] April 11, 1942, contract in its possession at the time it went into the gravel bar and moved out the gravel over Gallagher and McNutt brothers' road.

The only issue which remains, as I see it, in addition to the legal questions that are framed by the pre-trial order, is to show the cost of the road and to provide testimony as to the reasonable and fair market value of the use of the road such as was made by the Army, and we are prepared to put in that testimony at this time.

Mr. Twining: May I offer, as a Government's exhibit, the Judgment on the Verdict in Civil Case No. 1729, as well as final Judgment in Condemnation. Both are certified copies.

Mr. Dezendorf: No objection.

The Court: Admitted.

(Certified copy of Judgment on the Verdict, Civil No. 1729, thereupon received in evidence and marked Defendant's Exhibit No. 2.)

DEFENDANT'S EXHIBIT No. 2

In the District Court of the United States,
for the District of Oregon

Civil No. 1729

UNITED STATES OF AMERICA,
Plaintiff,

vs.

L. M. GOSSLER and ALTA L. GOSSLER, husband and wife; F. E. GALBREATH; J. J. OBERSON; J. H. GALLAGHER and JANE DOE GALLAGHER, whose true name is Belle K. Gallagher, his wife; POLK COUNTY, a municipal corporation and political subdivision of the State of Oregon,
Defendants.

EARL L. McNUTT and J. IRA McNUTT, co-partners doing business under the firm name and style of McNutt Bros.,
Intervening Defendants.

Judgment on the Verdict

This cause coming on regularly for trial on the 21st day of November, 1944, plaintiff appearing by Carl C. Donaugh & William M. Langley, Asst. U. S. Atty. and Ernest Falk and Linus M. Fuller, Special Attorneys, Department of Justice, and the defendants J. H. Gallagher and Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt appear-

Defendant's Exhibit No. 2 (Continued)

ing by their attorneys Lawrence T. Harris, Hampson, Koerner, Young and Swett and James C. Dezendorf, and it having been orally stipulated that the jury in this case should determine not only the value of the road across the property described in this proceeding as Tract No. C-10, but also the value of the interest of defendants J. H. Gallagher and Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt in and to the entire 1.8 miles of road leading from the county road across property formerly owned by A. W. Crocker and Agnes M. Crocker and described as Tract No. C-23 as set out in the case of the United States vs. O. C. Simpson, et al., Civil No. 1111, and across the above mentioned Tract No. C-10, and across adjoining land owned by Crown-Zellerbach Corporation to the site of the Santiam Bar, and also the value of said defendants' interest in and to said Santiam Bar under a contract with Crown-Zellerbach Corporation dated April 11, 1942; a jury was impaneled and sworn to try the issues in this cause and on order of the Court the jury viewed the said roadway across the Crocker property and across the Gossler property sought to be acquired by the United States by and through this proceeding and across the Crown-Zellerbach Corporation's property, and further viewed the Santiam Bar; and the jury, after hearing the testimony of witnesses for the plaintiff and for the defendants, argument of counsel and the instructions of the Court, did retire for deliberation and after deliberation did on

Defendant's Exhibit No. 2 (Continued)

the 24th day of November, 1944, return into this Court a verdict in words and figures as follows:

"In the District Court of the United States,
for the District of Oregon
Civil No. 1729

UNITED STATES OF AMERICA,
Plaintiff:,

vs.

L. M. GOSSLER, et al.,
Defendants,

EARL L. McNUTT, et al.,
Intervening Defendants.

Verdict of the Jury

We, the jury, duly empaneled and sworn to try the above entitled cause, do hereby find that the full market value of defendants J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt's interest in 1.8 miles of road leading to the Santiam Bar and including damage to their interest in said bar, which interest exists under a contract from Crown-Zellerbach arising from this proceeding, as of June 18, 1942, was and is the sum of One thousand - - - - Dollars ($1,000.00), said roadway crossing, among other lands, a tract formerly owned by L. M. Gossler and Alta L. Gossler, his wife.

Dated this 24th day of November, 1944.

JOHN E. MONTGOMERY,
Foreman."

Defendant's Exhibit No. 2 (Continued)

And It Appearing to the Court that the full amount deposited in the Registry of this Court in this cause heretofore has, pursuant to Order of this Court, been distributed and that there are no funds on deposit in the Registry of the Court to pay or satisfy the judgment hereinafter ordered and that the judgment obtained herein should bear interest at the rate of six per cent per annum from June 18, 1942, the date upon which this court entered an order granting to the United States of America immediate possession of the hereinafter described lands and also of Tract No. C-23, until paid: Now, Therefore, by virtue of the law and by reason of the premises and the verdict, It Is Hereby Considered, Ordered and Adjudged that upon payment into the Registry of this Court of the sum of $1,000.00, together with interest at the rate of six per cent per annum from June 18, 1942, until paid, a judgment and decree of this Court shall be entered herein appropriating and condemning for the use and purpose of the plaintiff, United States of America, as set forth in the Complaint in Condemnation herein and in the Declaration of Taking in United States vs. George J. Amort, et al., Civil No. 1481, the full fee simple title in and to the lands described in said Declaration of Taking and in said Complaint in Condemnation as Tract No. C-10 and more particularly described as follows:

Tract No. C-10:

Beginning at the Northeast corner of Lot No. 9 in Section 2, in Township 10 South, Range 4 West

Defendant's Exhibit No. 2 (Continued)

of the Willamette Meridian, and running thence West along the North line of said Lot and Section to the East bank of the Luckiamute River; thence along said bank of said river following the meanders thereof, upstream, to a point from which a line running East to the West line of the Donation Land Claim of Isaac N. Miller, Claim No. 52 in said Township and Range, and thence North 29° 15′ East to the place of beginning, will, with the other lines above described, include 38 acres, and from said point running East to the West line of said Donation Land Claim; and thence north 29° 15′ East on the West line of said Donation Land Claim to the place of beginning, being a part of the Donation Land Claim of Thomas Bowers in Polk County, Oregon.

Also, beginning at a point which is 40.06 chains North 29° 15′ East from a point 18.84 chains East and 6.87 chains North of the quarter section corner on the line between Sections 3 and 10 in Township 10 South, Range 4 West of the Willamette Meridian, in Polk County, Oregon, said beginning point being on the West boundary line of the Donation Land Claim of Isaac N. Miller, Claim No. 52 in Township 10 South, Range 4 West of the Willamette Meridian; thence running South 55° East 14.00 chains; thence South 16° West 7.50 chains; thence East 12.05 chains to the West bank of the Willamette River; thence down said river on the West bank thereof, following the East boundary line of said Donation Land Claim to the Northeast corner of

Defendant's Exhibit No. 2 (Continued)

said Donation Land Claim; thence West along the North line of said Donation Land Claim 52.68 chains; thence South 29° 15′ West along the West line of said Donation Land Claim to the place of beginning, in the County of Polk, State of Oregon.

Beginning at a point 6.38 chains East of the Northwest corner of the Southwest quarter of the Southwest quarter of Section 35 in Township 9 South, Range 4 West of the Willamette Meridian in Polk County, Oregon, and running thence South 13 chains; thence East 17 links to the West bank of the Luckiamute River; thence up said river following the meanderings thereof, South 15° East 4.70 chains; and South 29° East 2.70 chains to the South boundary line of said Section; thence East 11 chains to the Southeast corner of the Southwest quarter of the Southwest quarter of said Section; thence North 20 chains to the Northeast corner of the Southwest quarter of the Southwest quarter of said section and thence West 13.62 chains to the place of beginning, in the County of Polk, State of Oregon, and containing 297.45 acres, more or less.

subject, however, to existing easements for public roads and highways, for public utilities, for railroads, for pipe lines and for water and sewage systems; the value of all other interests in and to said property having heretofore been determined and compensation therefor paid by Order entered herein May 4, 1944;

Defendant's Exhibit No. 2 (Continued)

Dated this 24th day of November, 1944, at Portland, Oregon.

/s/ JAMES ALGER FEE,
District Judge.

[Seal]
A true copy, Lowell Mundorff, Clerk.

By /s/ J. CASE,
Deputy Clerk.

[Endorsed]: Filed December 4, 1944. Lowell Mundofff, Clerk; By R. DeMott, Deputy.

[Endorsed): Filed U.S.C.C.A., Sept. 22, 1947.

(Certified copy of Order Disbursing Funds and Final Judgment in Condemnation, Civil No. 1729, thereupon received in evidence and marked Defendant's Exhibit No. 3.)

DEFENDANT'S EXHIBIT No. 3

In the District Court of the United States,
for the District of Oregon

Civil No. 1729

UNITED STATES OF AMERICA,
Plaintiff,

vs.

L. M. GOSSLER and ALTA L. GOSSLER, husband and wife; F. E. GALBREATH; J. J. OBERSON; J. H. GALLAGHER and JANE DOE GALLAGHER, his wife, if married; Polk County, a municipal corporation and political subdivision of the State of Oregon;
Defendants,

EARL L. McNUTT and J. IRA McNUTT, co-partners doing business under the firm name and style of McNutt Bros.,
Intervening Defendants.

ORDER DISBURSING FUNDS AND FINAL JUDGMENT IN CONDEMNATION

This matter coming on upon the motion of the plaintiff, United States of America, by and through its attorneys of record, for an order disbursing funds and final judgment in condemnation, and It Appearing to the Satisfaction of the Court that this proceeding was instituted in accordance with and

Defendant's Exhibit No. 3 (Continued)

under the authority of the following Acts of Congress: The Act of August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257), Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and Acts supplementary thereto and amendatory thereof, Act of August 18, 1890 (26 Stat. 316) as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U.S.C. Sec. 171), and March 27, 1942 (Public Law 507—77th Congress), and the Act of April 28, 1942 (Public Law 528—77th Congress), and that the Secretary of War of the United States has selected the hereinafter described lands for acquisition by the United States of America for use in connection with the establishment of a military training camp known as Camp Adair, Oregon, and for other related military purposes, and for such other uses as may be authorized by Congress or by Executive Order, and has determined and is of the opinion that the hereinafter described lands are necessary and adequate to provide for the establishment of a military training camp and for related military purposes, and that said lands are required for immediate use and that it is necessary and advantageous to the interests of the United States to acquire the hereinafter described lands by condemnation under judicial process, and that by direction of the Attorney General of the United States, pursuant to the request of the Secretary of War, this condemnation proceeding was instituted pursuant to the aforementioned statutes for the purpose of

Defendant's Exhibit No. 3 (Continued)

acquiring the estate or interest hereinafter set forth in and to the lands so selected, and It Further Appearing to the Court that funds for the acquisition of said lands were appropriated by the Act of Congress approved April 28, 1942 (Public Law 528—77th Congress), and that there was deposited in the Registry of this Court in this cause the sum of $15,000.00 as estimated just compensation for the taking of the hereinafter described lands under the declaration of taking filed on October 5, 1942; and It Further Appearing to the Court that the defendants, L. M. Gossler and Alta L. Gossler, husband and wife, appeared herein by and through their petition for order fixing value and disbursing funds, and the defendant, Polk County, appeared by and through its answer, and the defendants, J. H. Gallagher and Belle K. Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, co-partners doing business under the firm name and style of McNutt Bros., appeared by their answers; and It Further Appearing to the Court that at the time of the filing of the declaration of taking on October 5, 1942, L. M. Gossler and Alta L. Gossler, husband and wife, were the owners in fee simple of the lands taken herein, subject to a mortgage in favor of the defendants, J. J. Oberson, subject to a mortgage in favor of defendant, F. E. Galbreath, and subject to an easement in favor of defendant, J. H. Gallagher, in and to which the defendants Belle K. Gallagher and Earl L. McNutt and J. Ira McNutt

Defendant's Exhibit No. 3 (Continued)

had an interest; and It Further Appearing to the Court that heretofore on May 4, 1944 an order was entered, fixing the value of all interests in and to said property, except the private roadway easement conveyed by L. M. Gossler and Alta L. Gossler to J. H. Gallagher by conveyance dated March 12, 1942, pursuant to which order and pursuant to order for partial distribution of funds entered April 20, 1943, the sum of $15,000.00 on deposit in the Registry of this Court was disbursed to defendants, Stella M. Galbreath as attorney in fact for F. E. Galbreath, J. J. Oberson, T. B. Hooker, Sheriff and Tax Collector of Polk County, and to L. M. Gossler and Alta L. Gossler; and It Further Appearing to the Court that this matter having come on for trial on November 21, 1944, to determine the value of the remaining interest in and to said property, to-wit: the private roadway easement above referred to, and the plaintiff, United States of America, and the defendants, J. H. Gallagher and Belle K. Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, co-partners doing business under the firm name and style of McNutt Bros., having stipulated in open Court by their respective counsel that the jury, upon the trial, should fix the full market value of said defendants' interest in 1.8 miles of road leading to the Santiam Bar and including damage to said defendants' interest in said Bar arising out of a contract with Crown Zellerbach Corporation, dated April 11, 1942; and

Defendant's Exhibit No. 3 (Continued)

the jury on November 24, 1944 having returned its verdict, finding that the sum of $1,000.00 was the full market value of defendants, J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt's interest in 1.8 miles of road leading to the Santiam Bar and including damage to their said interest in said Bar, said road crossing, among other lands, the hereinafter described tract, and judgment having been entered on said verdict on November 24, 1944 in favor of said defendants, J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt, for the sum of $1,000.00, together with interest at the rate of 6 per cent per annum from June 18, 1942 until paid, and the sum of $1,155.00 having been deposited in the Registry of the Court on January 25, 1945 in satisfaction of said judgment; and It Further Appearing to the Court that heretofore on December 7, 1944, the defendants, J. H. Gallagher and Belle K. Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, filed a motion for a new trial, and that on April 16, 1945, an order denying motion for new trial was entered; and It Further Appearing to the Court that defendants, J. H. Gallagher and Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt, are entitled to receive said sum of $1,155.00 now on deposit in the Registry of the Court; Now, Therefore, it is by the Court at this time Ordered, Adjudged and Decreed that the full fee simple title in and to the following described lands, to-wit:

Defendant's Exhibit No. 3 (Continued)

Tract No. C-10:

Beginning at the Northeast corner of Lot No. 9 in Section 2, in Township 10 South, Range 4 West of the Willamette Meridian, and running thence West along the North line of said Lot and Section to the East bank of the Luckiamute River; thence along said bank of said river following the meanders thereof, upstream, to a point from which a line running East to the West line of the Donation Land Claim of Isaac N. Miller, Claim No. 52 in said Township and Range, and thence North 29° 15′ East to the place of beginning, will, with the other lines above described, include 38 acres, and from said point running East to the West line of said Donation Land Claim; and thence north 29° 15′ East on the West line of said Donation Land Claim to the place of beginning, being a part of the Donation Land Claim of Thomas Bowers in Polk County, Oregon.

Also, beginning at a point which is 40.06 chains North 29° 15′ East from a point 18.84 chains East and 6.87 chains North of the quarter section corner on the line between Sections 3 and 10 in Township 10 South, Range 4 West of the Willamette Meridian, in Polk County, Oregon, said beginning point being on the West boundary line of the Donation Land Claim of Isaac N. Miller, Claim No. 52 in Township 10 South, Range 4 West of the Willamette Meridian; thence running South 55° East 14.00 chains; thence South 16° West 7.50 chains; thence East 12.05 chains to the West bank of the Willamette

Defendant's Exhibit No. 3 (Continued)

River; thence down said river on the West bank thereof, following the East boundary line of said Donation Land Claim to the Northeast corner of said Donation Land Claim; thence West along the North line of said Donation Land Claim 52.68 chains; thence South 29° 15′ West along the West line of said Donation Land Claim to the place of beginning, in the County of Polk, State of Oregon.

Beginning at a point 6.38 chains East of the Northwest corner of the Southwest quarter of the Southwest quarter of Section 35 in Township 9 South, Range 4 West of the Willamette Meridian in Polk County, Oregon, and running thence South 13 chains; thence East 17 links to the West bank of the Luckiamute River; thence up said river following the meanderings thereof, South 15° East 4.70 chains; and South 29° East 2.70 chains to the South boundary line of said Section; thence East 11 chains to the Southeast corner of the Southwest quarter of the Southwest quarter of said Section; thence North 20 chains to the Northeast corner of the Southwest quarter of the Southwest quarter of said section and thence West 13.62 chains to the place of beginning, in the County of Polk, State of Oregon, and containing 297.45 acres, more or less;

vested in the United States of America on October 5, 1942, free and discharged of all liens and claims of every kind whatsoever, subject, however, to existing easements for public roads and highways, for

Defendant's Exhibit No. 3 (Continued)

public utilities, for railroads, for pipe lines, and for water and sewage systems; and it is Further Ordered that the Clerk of this Court be and he is hereby authorized and directed to pay forthwith the sum of $1,155.00 now on deposit in the Registry of this Court in this cause to the defendants, J. H. Gallagher and Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt, co-partners doing business under the firm name and style of McNutt Bros., whose address is: Care of James C. Dezendorf, Attorney at Law, 800 Pacific Building, Portland, Oregon, in full satisfaction of said judgment and of all claims against the United States of America for the taking of the estate above set forth in and to the above described lands, without charging commission or poundage fees thereon, and that said Clerk take the receipt of said defendants therefor.

/s/ JAMES ALGER FEE,
District Judge.

Dated this 14th day of May, 1945, at Portland, Oregon.

A true copy.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ J. CASE,
Deputy Clerk.

[Endorsed]: Filed May 16, 1945. Lowell Mundorff, Clerk. By R. DeMott, Deputy.

[Endorsed]: Filed U.S.C.C.A. Sept. 22, 1947.

Mr. Dezendorf: At this time, may I offer a duplicate original of the contract between Crown Zellerbach Corporation and Gallagher, dated April 11, 1942, and the original agreement between McNutt brothers and Gallagher, which establishes their joint interest.

Mr. Twining: No objection.

The Court: Admitted.

(Duplicate original of contract between Crown Zellerbach Corporation and J. H. Gallagher, dated April 11, 1942, thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

PLAINTIFFS' EXHIBIT No. 4

This Agreement, Made and entered into this 11th day of April, 1942, by and between Crown Zellerbach Corporation, a corporation of the State of Nevada, whose principal business is that of manufacturing paper, hereinafter called the "Seller," and J. H. Gallagher of Corvallis, Oregon, hereinafter called the "Purchaser,"

Witnesseth:

That parties hereto, each in consideration of the agreements and the performance thereof on the part of the other, do agree:

1. Easements to Obtain Sand and Gravel: Subject to the terms and conditions hereof and subject to the Purchaser commencing active operations hereunder within Ninety (90) days from the date

Plaintiffs' Exhibit No. 4—(Continued)

of this agreement, the Seller hereby grants the Purchaser the right and privilege of taking sand and gravel from the following describde property:

> A parcel of land in Township 9 South, Range 4 West of the Willamette Meridian, Polk County Oregon, more particularly described as follows, to-wit:
>
> Beginning at a point Twenty (20) Chains due East on the Township line from the Southwest corner of Section 35 and running thence East to the West boundary line of Isaac N. Miller's D.L.C.; thence Northeasterly along the West boundary line of said claim to Northwest corner thereof; thence East along the North boundary line of said claim to the West bank of the Willamette River; thence with the meanderings of said river to the mouth of the Luckimute River; thence up the South bank with the meanderings of said river to a point due North of the place of beginning, and thence to the place of beginning, in Section 35, together with all accretion thereto which under the laws of the State of Oregon may be owned by the Paper Company.

The precise place or places from which said Purchaser shall be permitted to take sand and gravel hereunder shall be designated by the Purchaser from time to time as required by the users of the material and the areas from which sand and gravel may be taken hereunder shall be staked out upon

Plaintiffs' Exhibit No. 4—(Continued)

the ground by the Purchaser subject to approval of the Seller, and such areas may not exceed the quantity in yardage required by the Purchaser to maintain his stock piles or fill the contract requirements of the users of such sand and gravel by more than Twenty-five (25%) Percent; in other words, it is understood by and between the parties hereto that the Seller may sell sand and gravel from the above described property to other persons, firms or corporations and that the Purchaser shall not be permitted to stake out in advance for purchase hereunder more than Twenty-five (25%) Percent in excess of the yardage which he expects to place in stock piles or sell to the users of such material within a reasonable period of time.

2. Easement for Location of Equipment and Bunkers: Subject to the terms and conditions hereof, the Seller hereby grants the Purchaser such rights of way for roads, telephone and transmission lines or other facilities as may be required upon the property together with the right and privilege of occupying and using one or more locations upon its property to be hereafter staked out upon the ground by the Purchaser with the approval of the Seller, to be used by the Purchaser for the construction and maintenance of bunkers and other improvements and/or stock piles reasonably necessary and/or convenient for the handling of sand and gravel from the lands of the Seller under the provisions of this agreement.

Plaintiffs' Exhibit No. 4—(Continued)

3. Manner of Operation: It is expressly understood that the Purchaser, in taking said sand and gravel under the provision of this agreement, shall not needlessly interfere with the use of the adjacent property of the Seller, or with any operation of the Seller, and particularly the Purchaser shall not needlessly interfere in any manner with the operations of any other person, firm or corporation who may contract for the purchaser of sand and gravel from the hereinabove described property of the Seller immediately adjacent to or abutting upon the area staked out by the Purchaser with the approval of the Seller and from which sand and gravel is being removed hereunder by the Purchaser; nor shall the Seller or any other person, firm or corporation obtaining sand and gravel from such adjacent property, needlessly interfere with the operations of the Purchaser.

4. Use of Roads and Rights of Way: As part consideration for the sand and gravel purchased hereunder by the Purchaser, the Purchaser hereby agrees that the Seller or its Assigns shall have the right to use any private roads constructed by or used by the Purchaser for obtaining the sand and gravel purchased hereunder; it being understood that such private roads shall be available to the Seller and any persons, firms or corporations to whom the Seller may sell sand and gravel from the herein described property, provided the Seller and/or such persons, firms or corporations shall

Plaintiffs' Exhibit No. 4—(Continued)

reimburse the Purchaser on some reasonable basis for the use of such private roads; such reimbursement to be at a reasonable royalty rate on a per cubic yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads, taking into consideration the yardage of sand and gravel being hauled by the Purchaser and the yardage of sand and gravel to be hauled by the Seller or such persons, firms or corporations to whom it might sell sand and gravel. In the event the purchaser is not carrying on active operations hereunder, he shall not be required to maintain his private roads for the use of others while not operating. It being understood that during such period of time, the Seller or such other persons, firms or corporations to which it may sell sand and gravel from its property shall, if using the private roads of the Purchaser, maintain such private roads in a good state of repair until such time as the Purchaser may resume active operations hereunder.

5. Price for Sand and Gravel: For each cubic yard of sand and/or gravel removed from the property of the Seller as hereinabove described, the Purchaser shall pay the Seller Eight (8c) Cents per cubic yard; such rate shall apply to both washed and/or unwashed sand and gravel whether used for road material or for other concrete construction or maintenance. Provided, however, that if the State of Oregon shall assert a claim to any of the sand

Plaintiffs' Exhibit No. 4—(Continued)

and gravel sold hereunder, the Seller may, at its option, refund the payment made by the Purchaser for the quantity of sand and gravel claimed by the State and in this event, the Purchaser shall assume the full liability of making payment to the State of Oregon for the sand and gravel or other material removed from any property, the title to which may rest in the State of Oregon, or, if it elects so to do, the Seller may retain the amount received from the Purchaser for sand and gravel removed from land claimed by the State of Oregon and in this event the Seller shall assume the obligation of defending any suit prosecuted in the name of the State of Oregon, but in the event of a judgment in favor of the State of Oregon, the Seller shall not be obligated to pay to the State of Oregon a sum in excess of the amount received from the Purchaser for the sand and gravel or other material claimed by the State of Oregon, and the Purchaser agrees to pay to the State of Oregon any judgment in excess of the amount received by the Seller. The Purchaser shall have the privilege of joining with the Seller in the defense of any suit which may be brought in the name of the State of Oregon to collect a royalty on any of the sand and gravel or other material removed from the hereinabove described property.

6. Payment for Sand and Gravel: On or before the 10th day of each month during the term of this agreement, the Purchaser will render the Seller a

Plaintiffs' Exhibit No. 4—(Continued)

statement of all sand and/or gravel which may have been removed by it from the land of the Seller during the preceding month based upon the tickets issued on each load of material and will remit with such statement such amount as may be due the Seller hereunder for sand and/or gravel removed furint the preceding month. The Seller shall have the right to examine all books, records and accounts of the Purchaser to satisfy itself as to the accuracy of statements rendered by the Purchaser and the Purchaser hereby agrees that tickets bearing consecutive numbers will be used in maintaining a record of the quantity of sand and/or gravel removed from the property of the Seller and shall issue a numbered ticket for each load of material removed from the property; such ticket to also show the date issued and bear the signature of the truck driver or the name of the person using the material.

7. Quality: The quality of the sand and/or gravel sold and purchased hereunder shall conform to the specifications required for ordinary road construction ballast or for concrete use in paving, foundation work or other building construction. Any soil or other waste material not suitable for use by the Purchaser may be excavated and placed upon the adjacent land of the Seller at a location to be designated by the Seller; provided, however, that such waste material shall be spread upon the adjacent land as directed by the Paper Company. It being understood that such waste material may not be placed upon that portion of the land of the Paper

Plaintiffs' Exhibit No. 4—(Continued)

Company not staked out by the Purchaser and from which sand and gravel may be sold to others.

8. Term: The term of this agreement shall be from date hereof to and including the 31st day of December, 1945. Provided, however, that this agreement shall automatically terminate in the event the purchaser shall fail to commence active operations hereunder on or before July 1, 1942. The Purchaser shall be presumed to have commenced active operations hereunder if he shall commence the construction of bunkers and other improvements required for the handling of sand and gravel from the lands of the Seller and shall engage in placing sand and gravel in stock piles or in making actual delivery of such material to any persons engaged in road construction, foundation work or other building construction incidental to or in connection with the so-called Albany-Corvallis Cantonment for which construction contracts are now being let by the U. S. Army Engineers. If the operations of the Purchaser hereunder are conducted satisfactory to the Seller, this agreement may be extended from year to year by mutual agreement betwen the parties hereto.

9. Indemnity: The Purchaser will save and hold harmless the Seller from any loss, damage, charge or expense, arising or growing out of the performance, non-performance and/or mal-performance by the Purchaser of the obligations assumed by him under this agreement, or in the performance by him of the operations contemplated hereunder.

Plaintiffs' Exhibit No. 4—(Continued)

10. Default: Upon default of the Purchaser in the performance of any obligation by him assumed hereunder, after Thirty (30) days' notice in writing from the Seller requesting performance hereunder, the Seller may, at its discretion, cancel and terminate this agreement by declaration in writing to that effect to be served upon the Purchaser.

11. Removal of Property: Within thirty (30) days after the expiration or termination of this agreement, the Purchaser will remove his bunkers, improvements and/or personal property from the property of the Seller.

12. Taxes and Liens: The Purchaser will promptly pay any and all taxes which may be lawfully assessed and levied against any improvements of the Purchaser erected hereunder and/or against the business and/or operations of the Purchaser hereunder, and will not permit such taxes and/or assessments to become delinquent.

The Purchaser will promptly pay for all labor and material which may be employed or used in the conduct of his operations hereunder and will not suffer nor permit any lien of any kind or nature to attach to the property of the Seller by reason thereof.

13. Assignment: The Purchaser will not assign this agreement nor any interest herein, nor sublet any operation hereunder without first obtaining the consent in writing of the Seller to such assignment

Plaintiffs' Exhibit No. 4—(Continued)

or subletting. Provided, however, that the Purchaser may assign this agreement to McNutt Brothers of Eugene, Oregon for the purpose of carrying out the provisions of said agreement but such assignment shall not be effective unless and until McNutt Brothers execute a formal agreement in favor of the Seller in which they agree to assume and carry out all of the obligations of the Purchaser hereunder. Such agreement shall incorporate all of the conditions and provisions of this agreement by reference therein and the attachment thereto of the executed counterparts of this agreement. Such agreement shall further provide that the said McNutt Brothers may not thereafter assign the agreement or any interest therein, nor sublet any operation thereunder without first obtaining the consent in writing of the Seller to such assignment or subletting.

14. This Agreement Exclusive: All other verbal and/or written agreements between the parties hereto, concerning the subject matter hereof, are hereby cancelled, terminated and held for naught, and it is expressly understood that this agreement shall be the sole and exclusive agreement between the parties, governing their relations with respect to the subject matter of this agreement. And it is further understood between the parties hereto that the rights of the Purchaser to obtain sand and gravel from the hereinabove described real property

Plaintiffs' Exhibit No. 4—(Continued)

of the Seller is not exclusive and that the Seller retains the right to sell sand and gravel from its property to other persons, firms or corporations and the right to go upon its property for all purposes indidental thereto and may permit others to construct and maintain on its premises bunkers and other improvements reasonably necessary and/or convenient for the removal of sand and gravel, all of which may be removed over any private rights of way or roads owned by, used by or in the possession of the Purchaser and/or his successors or assigns as of or subsequent to the date of this agreement.

15. Purchaser as Independent Operator: It is understood by and between the parties hereto, that the Purchaser shall operate hereunder as an Independent Contractor and/or Operator and not as an employee of the Seller, and that any person or persons employed by the said Purchaser to aid or assist in carrying on the work under the conditions of this Agreement, shall be employes of the said Purchaser and not employes of the Seller.

(a) The Purchaser further agrees to carry on the work to be performed under this Agreement within the terms of and subject to the compensation and/or industrial insurance act of the State of Oregon, and will pay any and all sums due and payable therefor to the Commission administering such Act.

Plaintiffs' Exhibit No. 4—(Continued)

(b) The Purchaser further agrees to pay or cause to be paid to any Federal, State, County, City, Municipal or other agency, authority or commission having jurisdiction in the premises, any compensation, fee, license, tax or other payments, including employers' and employes' payroll contribution or deduction, required to be paid by the Purchaser, his representatives, agents or employes, or by his Assigns, Sub-contractors or the representatives, agents or employes of such Assignees or Sub-contractors, under the provisions of any law, ordinance or regulation applicable thereto; and, it is expressly understood and agreed by the parties hereto, that the Seller shall not be held liable or responsible for the collection, deduction and/or payment of any sums required to be paid as aforesaid, and the Purchaser will save and hold harmless the Seller from any and all liability whatsoever, for the collection, deduction and/or payment of any sums required to be paid under any such law, ordinance or regulation.

(c) The Purchaser has qualified or hereby agreed to immediately qualify and will require his Assignees and/or any and all Sub-contractors to qualify, and remain qualified for the term of this Agreement, as an employer or employers under any and all Social Security laws or similar statutes, if permitted so to do voluntarily or otherwise.

Plaintiffs' Exhibit No. 4—(Continued)

In Witness Whereof, the parties hereto have caused this Agreement to be executed as below subscribed.

CROWN ZELLERBACH CORPORATION,

By /s/ LOUIS BLOCK,
Chairman of the Board.

Attest:

/s/ D. J. GALEN,
Secretary.

Witnesses:

/s/ E. H. POST,
/s/ A. HEROUX,

/s J. W. GALLAGHER.

Witnesses:

/s/ B. K. GALLAGHER,
/s/ ALCON E. J. GALLAGER.

[Endorsed]: Filed U.S.C.C.A. Sept. 22, 1947.

(Original contract, dated April 13, 1942, between Earl L. McNutt and J. Ira McNutt, doing business under the name of McNutt Brothers, and J. H. Gallagher, thereupon received in evidence and marked Plaintiffs' Exhibit No. 5.)

PLAINTIFFS' EXHIBIT No. 5

Agreement

(Between McNutt Bros. and J. H. Gallagher)

This Agreement entered into between Earl L. McNutt and J. Ira McNutt, partners doing business under the firm name and style of McNutt Bros., and hereinafter for brevity sometimes referred to as "McNutt Bros.," and J. H. Gallagher, for bervity hereinafter sometimes referred to as "Gallagher,"

Witnesseth:

Recitals:

A. Gallagher has a letter from Crown Zellerbach Corporation dated March 13, 1942 committing that corporation to enter into a lease for the term of three years, for the rentals and on the terms and conditions set forth in said letter, entitling Gallagher, his heirs or assigns, to remove sand and gravel from what is known as the Santiam Bar, which is located at a point near the confluence of the Santiam River with the Willamette River in Polk County, Oregon. It is contemplated that a formal lease will be executed by said Crown Zellerbach Corporation and said Gallagher. A copy of said lease, when made, shall be attached hereto and marked Exhibit A and made a part hereof.

B. A right of way has been granted by A. W. Crocker and his wife to Gallagher over what is known as the Crocker farm, and a copy of said grant of right of way is attached hereto, marked Exhibit B and made a part hereof.

C. L. M. Gossler and his wife have granted to Gallagher a right of way over the Gossler farm; and a copy of said grant of right of way is attached hereto, marked Exhibit C and made a part hereof.

D. The rights of way granted under and by force of Exhibits B and C afford ingress to and egress from said Santiam Bar.

E. D. C. Crawford and his wife has granted to Gallagher, his heirs or assigns, a lease entitling Gallagher to take gravel and sand from an area inside lands owned by said Crawfords, for the price and on the terms and conditions set forth in said lease, and a copy of said lease is attached hereto, marked Exhibit D and made a part hereof.

F. Gallagher has incurred certain expenses in procuring said leases and rights of way.

G. Although the parties contemplate that most of the sand and gravel to be taken from the Santiam Bar will be used in connection with the development of the Cantonment now in the course of construction and situate between Corvallis and Monmouth, Oregon, nevertheless, it is also contemplated that McNutt Bros. will sell sand and gravel to any other party or parties desiring to buy for prices satisfactory to McNutt Bros.

Now, Therefore, in consideration of the premises and the mutual promises herein contained, and the moneys to be paid and things to be done as herein specified, it is agreed between the parties hereto as follows:

I.

Covenants by Gallagher

Gallagher covenants and agrees as follows:

1. That he will coincidently with the execution of these presents execute and deliver to McNutt Bros. assignment of:

(a) The Santiam Bar lease;
(b) The Crocker right of way;
(c) The Gossler right of way; and
(d) The Crawford lease.

2. That he will give such of his time and attention to sales of sand and gravel to be taken from said Santiam Bar and to the collection of the proceeds of such sales as McNutt Bros. may from time to time request; and Gallagher shall be paid by McNutt Bros. for said services, on a sale basis, such amounts as the parties hereto may hereafter determine, together with his reasonable expenses incurred in the rendition of such services.

3. That he will endeavor to obtain leases on such other areas as are accessible to said Cantonment as McNutt Bros. may indicate, and if Gallagher does acquire such leases on such terms and for such prices as may be mutually satisfactory to him and McNutt Bros. he shall assign the same to McNutt Bros. on such terms as McNutt Bros. and Gallagher may hereafter agree.

II.

Covenants by McNutt Bros.

McNutt Bros. covenant and agree as follows:

1. That they will within a reasonable time furnish and commence to install on the Santiam Bar, and with reasonable diligence complete the work of installing such equipment as will produce a minmum of seventy-five (75) yards more or less of sand and gravel per hour from said Santiam Bar.

2. That they will manage and carry on the work and business of operating said plant so to be installed until said Santiam Bar is exhausted, but in no event beyond the term of three years prescribed in the Santiam lease.

3. Nothing herein contained shall be so construed as to obligate McNutt Bros. to crush any gravel or any rock. However, it is agreed that if any rock or gravel is crushed in the operation of the plant on said Santiam Bar the parties hereto shall share in the profits on the same basis as herein prescribed.

III.

Mutual Covenants and Agreements

It is agreed between Gallagher and McNutt Bros. as follows:

1. McNutt Bros. shall be paid each month as rental for the use of all equipment installed by them an amount equal to Ten percent (10%) of the origi-

nal cost of such equipment for the first shift of each calendar day and Five percent (5%) for each additional shift in such calendar day.

Gallagher shall be paid rentals on the same basis as the rentals paid to McNutt Bros. for all equipment furnished by Gallagher at the request of McNutt Bros. and used by McNutt Bros. in the operation of the Santiam Bar.

2. The cost of placing equipment in position shall be included as a part of the expense of operation.

3. McNutt Bros. shall be reimbursed for expenses hereafter incurred.

4. Gallagher shall out of the first net profits be reimbursed for all expenses incurred by him to date.

5. Gallagher may from time to time and as often as he desires so to do call upon the Bookkeeper for information as to the then condition of the books with reference to the Santiam Bar.

6. All equipment furnished by the McNutt Bros. shall at the end of the operation hereunder be returned to McNutt Bros. in as good working condition as the same were at the time of the installation, reasonable wear and tear and damage by the elements excepted.

7. It is expressly agreed that the matter of operating the Crawford bar, if the same is operated, is to be determined by the parties hereto at some future time.

8. After paying all the expenses of the operation of the Santiam Bar the net profits, if any, shall be divided as follows: On the first day of each calendar month beginning with August 1, 1942 and so long as the parties hereto operate hereunder, all surplus funds remaining after the payment of expenses shall be divided one-third to J. H. Gallagher, one-third to Earl L. McNutt and one-third to J. Ira McNutt; and upon completion of the operations hereunder, with reference to the Santiam Bar, the McNutt Bros. shall furnish to Gallagher a complete statement showing the operations hereunder.

9. These presents shall be binding upon and the benefits thereof shall inure to not only the respective parties hereto but also to the respective heirs, legal representatives and assigns of the parties hereto.

In Witness Whereof the parties hereto have subscribed these presents in triplicate this 13 day of April, 1942.

/s/ EARL L. McNUTT,
/s/ J. IRA McNUTT,
Partners doing business
under the name of
McNutt Bros.

/s/ J. H. GALLAGHER.

[Endorsed]: Filed U.S.C.C.A. Sept. 22, 1947.

Mr. Twining: If your Honor please, the Government, of course, takes quite a different view of this case than that stated by Mr. Dezendorf. I came into this case rather late, as your Honor knows. I think there was a motion before the Court for summary judgment on the pleadings. No doubt your Honor is familiar with it. I doubt whether it was ever argued; nothing done about that.

In stating the Government's view, it is the Government's theory in this case that the plaintiffs' action was res adjudicata; that the issues were submitted and that the prior judgment is a bar to this action; if there is any technical jurisdictional objection, then, clearly, the principle of estoppel applies. This road has been fully paid for, and that was clearly expressed in the stipulation made and in the terms of the verdict brought in by the jury and in the judgment that was entered.

The verdict of the jury, in considering the roadway, including the roadway before the Court here, the section going across the gravel bar or to the gravel bar, the Crown Zellerbach section of the road, is as follows:

> "We, the jury, duly empaneled and sworn to try the above entitled cause, do hereby find that the full market value of defendants J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt's interest in 1.8 miles of road leading to the Santiam Bar and including damage to their interest in said bar, which interest exists under a contract from

Crown Zellerbach arising from this proceeding, as of June 18, 1942, was and is the sum of One Thousand Dollars ($1,000), said roadway crossing, among other lands, a tract formerly owned by L. M. Gossler and Alta L. Gossler, his wife.

"Dated this 24th day of November, 1944."

It was the Government's position at the time this case came on and when it was considered by Judge Fee and this jury that it was all included. The real problem in this case—I don't think it is a big problem, not so big as it appears. At least, *that the* Government's position. Judge Fee, when he passed on the case, stated very plainly, "If you do not own the rest of the road, then, you have not lost anything. If you do own all the rest of the road, then what is your damage here to this one section?"

So, in order to compensate the defendant in that case, necessarily it had to be viewed in the terms of the value of the entire road, and that was done. The stipulation made in that case, which was read to your Honor, stipulated for just that. The jury considered the fair market value of the entire road, a mile and eight-tenths across all the property, even including the interest in the gravel bar. There was no possibility of giving the defendant in that case any sum of money for taking a chunk out of that road. Judge Fee tried to keep the record clear. The jury considered here only one thing, the fair market value of this road in its entirety.

He states here in his remarks made from the bench at the time the motion for new trial was taken

under advisement, "I think the Court will not pass on the question whether or not the Tucker Act cases were involved in this matter, and whether the verdict was on those cases or not. That would be a question in another lawsuit." That is all. [14] He does not know what is coming up. He states here later——

The Court: Can either of you tell me what he meant by using the plural, "Tucker Act Cases?"

Mr. Twining: What he meant by the plural?

The Court: Yes.

Mr. Twining: Yes, I think I can, in the light of what he says here. There were many things that crept into this case, and it was known to the jury and made known to the Court that there might be any number of claims arising. There was the question of sand and gravel piles having been taken; there was the question of the roadway used, and they just had no picture of anything but this condemnation proceeding.

The Court: Was this condemnation confined solely to the road?

Mr. Twining: No, your Honor. Their case generally was a severance from the entire Camp Adair condemnation, this particular matter before the jury which we are speaking of now, and was discussed in these remarks of Judge Fee, denying the motion for new trial. The verdict of the jury, which I read to your Honor, applies specifically to the question then presented to the jury of compensating for this Gossler tract which bisected the road—simply taking a chunk out of the road and forever rendering it useless to the defendant in that case.

The Court: Was the Gossler land taken in that case?

Mr. Twining: The Court says in his opinion in this case: "Actually, the Court assumed that the defendants would not be fairly compensated for their interest in this roadway across the Gossler land unless the entire strip, commencing at the gravel pit on the Crown Zellerbach lands and running to the county road were evaluated. Whether these interests were paid for in this case does not affect the validity of the judgment here. If so, defendants have received more than they were entitled to because such interests were fairly submitted for evaluation." That is the interest involved here, the interest in the mile and eight-tenths——

The Court: This was just a case about the road. It was just a road case, not a case for the value of the land?

Mr. Fuller: The Gossler land was involved in Civil No. 1729. The interest of Gallagher across the Gossler land was not tried in the Gossler case. Gossler accepted the amount on deposit, leaving the interest of Gallagher in the road to be determined.

The Court: He brought another case?

Mr. Fuller: No, that was all in the same case. It was just the one interest that was determined in the condemnation. There was no trial as to the value of the fee, other than just ex parte testimony.

Mr. Twining: I think, your Honor, to continue here along the line that Mr. Dezendorf mentioned,

as to what Judge Fee said in denying the motion for a new trial in this case: Mr. Dezendorf suggested, "Of course, your Honor, that is involved in the Tucker Act case starting tomorrow. Is that what you have reference to?

"The Court: No, I am not talking about that. The Court expressly told this jury that there was no gravel sold that was involved in this case. I don't know what that means, or anything else. If there is any gravel involved, that belongs to some other case; does not belong to this. As I take it, that involved simply the trial as to the value of this easement over a particular piece of land. That is the only thing that is involved. It is true, the Court did not submit to the jury the value of the easement over other lands, because of the fact that if you did not have an easement over this land you were not entitled to be paid. In other words, could you use the rest of the land if you could not use this? That is the theory on which this case was submitted."

Judge Fee carefully instructed the jury to find the reasonable market value of this whole road. That is what the testimony is—the whole road. That is what they found in their verdict, and, for that reason, we insist that there is just no basis for this suit. [17]

I am sorry, your Honor. I have not made a study of the law.

If the principle of res adjudicata does not apply, then, we come to the secondary thing, and that is, having filed this complaint, what is it you are ask-

ing for? You are asking for something for which, as a matter of record in the prior case, you have already been compensated. There is no way out of it. It so appears in the stipulation, in the judgment and in the Court's remarks as to what the parties were trying to achieve.

In so far as the factual aspect of this case is concerned, the Government's position is this—and I think a reading of the Crown Zellerbach contract will bear it out very plainly: The Crown Zellerbach people had a bar here, a valuable gravel bar, which they wished protected, and they had other interests there, and they wished to assist the Army in the use of that pit. When they made the contract with Gallagher, they did not know who would buy this gravel, so they wanted to protect themselves—so, in order to protect themselves, they very carefully put a provision in the contract that anybody else buying gravel from them shall have the right to use that road and they said to the Army, "You are entitled to be protected in accordance with this contract." What is the protection? That they can make a profit on the road? No. They are limited and they could [18] never charge a cent more than the proportionate cost of the road; after they got to the point where the road was paid for, they could not charge one single cent.

What did the road cost? The position of the Government is this, that before this Army situation arose they had use of the road themselves, and are entitled to bear some part of the cost of the mile and eight-tenths of road. Strong & McDonald paid

$3,000 for the number of yards of gravel hauled that they hauled over this mile and eight-tenths, or this fraction of the road, which is somewhere around 25 per cent—maybe a little more—25 or 30 per cent of the entire road, and plaintiffs have already been paid $1,000, another thousand dollars. Figuring it on a cubic-yard basis, it is practically 35 or 40 cents a yard for the gravel going over that chunk of road. That is what it amounts to on a mileage basis—five times what they paid for the gravel to Crown Zellerbach.

The Government's position is that they have been fully compensated, even if the legal aspects of the case do not preclude it.

Mr. Dezendorf: Shall we proceed with our testimony?

The Court: Yes. [19]

STANLEY EDWARD QUIGLEY

was thereupon produced as a witness on behalf of the plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. Your name is Stanley Edward Quigley?

A. Yes.

Q. By whom are you employed?

A. McNutt Brothers.

Q. Were you working for McNutt Brothers at the time this Santiam Bar road, in the vicinity of Santiam Bar, was built? A. I was.

(Testimony of Stanley Edward Quigley.)

Q. What was your connection with the building of that road into the Santiam Bar?

A. I supervised it for McNutt Brothers.

Q. You were in complete charge, as far as McNutt Brothers were concerned, is that right, of that road? A. That is right.

Q. Are you familiar with the cost of constructing the road, in so far as McNutt Brothers are concerned?

A. That is right, I am.

Q. What was the cost to McNutt Brothers of the work that they did on the road?

Mr. Twining: I object to that, if your Honor please. I think this question is immaterial. There is no question [20] here about the value of this road. It is not within the realm of the complaint and the pre-trial order. The whole thing is immaterial.

The Court: How are you going to approach it? I suppose it could be done on a footage basis.

Mr. Dezendorf: My theory is to show, first, the cost of the road, because I do not think it is practical to break down the cost of any particular part. My theory is that the cost of the whole road is the measuring stick which was laid down by the Crown Zellerbach Corporation and that that must be the measuring stick in this case. I understand the Government has a different theory.

The Court: Admitted, subject to objection.

Q. (By Mr. Dezendorf): What was the expense to McNutt Brothers for the work that they did on the road? A. $7,500.

(Testimony of Stanley Edward Quigley.)

Mr. Dezendorf: I think Mr. Gallagher is more familiar, your Honor, than this man, with distances.

A. That is right.

Mr. Dezendorf: You may cross-examine.

Cross-Examination

By Mr. Twining:

Q. When were you there, actually, physically present on the road?

A. Every day during its construction. [21]

Q. What period of time was that?

A. Right after they entered into this agreement with Gallagher to build this road, which was along about the 14th, or somewheres after the 10th of April in 1942, until the road was completed.

Q. You say you were supervisor?

A. That is right.

Q. You were on the job there?

A. That is right.

Q. Over there every day? A. Yes.

Q. What hours did you work?

A. The men worked from 8 to 5.

Q. You were there all the time?

A. I wasn't there every minute of the day, no.

Q. Did you keep any books? A. I did not.

Q. Pay the bills? A. Yes.

Q. That is the way you got your figure of $7,500?

A. That is right, and we kept our foreman there on the job and advised him to keep a daily record of every hour that the equipment and men worked. That is the practice that has been followed for years and still is.

(Testimony of Stanley Edward Quigley.)

Q. When you came in there, was there any road there? [22]

A. Mr. Gallagher had built a pioneer road, as we called it. That road was put into the bar, just between trees and so forth, so he could get the equipment into the bar.

Q. All the time you were there on this job, that was prior to the time Strong & McDonald came in?

A. I was there prior to the time they came in and was still around there when Strong & McDonald used the road.

Q. This $7,500 construction cost you spoke of, was that incurred before Strong & McDonald came there?

A. That is right. That was in building the road and getting it ready to haul out over it.

Q. That is Gallagher's mile and eight-tenths road?

A. That is right, from the county road to the bar.

Q. Is the character of the road the same from the county road clear out to the gravel pit, or does it change in character?

A. Oh, it changes in character in different places. It would balance out, I think, about the same, but you know, you get some places where the timber is real thick and then there would be a gully and steep conditions——

Q. On the Crown Zellerbach tract, where the timbered area starts, isn't that most a gravel setup there?

(Testimony of Stanley Edward Quigley.)

A. No, that is not right. It varies from—just as you went over the property line, there was a large gully and there was soft marshland in there, and then you ended up [23] on the gravel bar.

Q. Do you know what the proportionate cost of this thing would be attributable to the Crown Zellerbach part of the road? Did you ever make any breakdown of that?

A. I did not, but I would presume that it was about evenly divided, maybe not exactly but pretty evenly divided in the three properties. That would be about right.

Mr. Twining: That is all.

(Witness excused.)

J. H. GALLAGHER

one of the plaintiffs herein, produced as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. You are one of the plaintiffs in this case?

A. Yes.

Q. What, if anything, did you have to do with building a road in from the county road to the Santiam Bar?

A. I built the pioneer road in there.

(Testimony of J. H. Gallagher.)

Q. Was that done by you and built under your direction? A. Yes.

Q. What was your cost in building this so-called pioneer [24] road into the Santiam Bar?

A. About $1,500.

Q. Speak up loudly so that we can all hear you. You say about $1,500?

A. About $1,500, yes, sir.

Q. What was the cost of acquiring the easements that were acquired on which to build the road?

A. To Crocker and Gossler, $1,190 I believe was the figure.

Q. What is your business, Mr. Gallagher?

A. Well, I am a consulting engineer. We have a business there, the sand and gravel business; build roads and stuff of that kind.

Q. You have had experience in building roads prior to this time? A. Yes.

Q. What, in your opinion, would be the reasonable and fair market value for the use of that road into the Santiam Bar in hauling gravel out over it?

A. Ten cents a yard.

Mr. Dezendorf: I think you may cross-examine.

Cross-Examination

By Mr. Twining:

Q. Mr. Gallagher, could anybody pay ten cents a yard and compete with another company?

A. We were paid ten cents a yard for use of the road. That [25] was negotiated with Mr. Strong and he said he wanted to take 30,000 yards out of

(Testimony of J. H. Gallagher.)

there and agreed to $3,000 on that basis. That is where I got that figure.

Q. He got 68,000 yards there?

A. I don't know, but he said he only wanted about 30,000 yards.

Q. Is it not a fact that you figure the hauling cost of hauling gravel, that it costs about ten cents a mile around that area?

A. That was the prevailing price at that time, yes, ten cents a mile.

Q. That includes wages, truck use and everything else; in other words, if you were going to haul gravel and deliver it five miles from the pit, you would have to put a 50-cent charge on it to offset your cost of hauling?

A. That would be just for trucking, yes.

Q. Here you think it is proper to charge ten cents a mile for a mile and eight-tenths of road?

A. Well, Mr. Strong did not object to it.

Q. But actually what Mr. Strong paid was less than five cents a yard for the full mile and eight-tenths of road, isn't that right?

A. Shall we say Mr. Strong misrepresented his case to me?

Q. It was a case of misrepresentation?

A. Yes, sir. [26]

Q. Mr. Gallagher, you are familiar with the contract you made with the Crown Zellerbach people?

A. Yes, sir.

Q. Was it your interpretation of the contract that you would charge the fair, reasonable market value of that road? A. Yes, sir.

(Testimony of J. H. Gallagher.)

Q. You remember those words, describing the cost of the road——

A. Repeat that question.

Q. Your contract states that you are to be protected in your roadway and that you can charge for that roadway a fair, reasonable rate per cubic yard?

A. Yes.

Q. Based upon the cost of that road?

A. Yes

Q. Is it your position that gives you the right to make a fair, reasonable charge on any amount of gravel or just up to the amount of the cost of the road?

Mr. Dezendorf: The contract also provides that maintenance may be taken into consideration, after the original cost. I don't think the question is just proper.

Q. (By Mr. Twining): Do you think your contract limits you to a recovery on your cost of building the road and maintenance, or do you think you can make a money-making proposition out of it and get all the market would bear, regardless of the cost of the road?

A. Well, we thought that the price asked was a reasonable price, and we wanted to get our money out. We did not know that there was any more to be hauled. We thought ten cents, in other words, was a reasonable price, and would still leave us holding the sack.

Q. You think, then, the Government hauling 68,000 yards over the Crown Zellerbach portion of this

(Testimony of J. H. Gallagher.)

road a matter of maybe 3,000 feet or so, roughly, and getting ten cents a yard for that is reasonable?

A. Yes, I think so, sir, yes.

Q. In the light of your cost? A. Yes.

Q. Then, you feel about three or four times that rate would be proper to haul it to the county road, a mile and eight-tenths, over three times as far?

A. As far as is concerned, they were hauling over the whole road.

Q. You had been paid for the rest of the road, isn't that right?

A. We had not been paid, no, we had not been paid for it yet.

Mr. Twining: I think that is all. [28]

Redirect Examination

By Mr. Dezendorf:

Q. There is one question I forget to ask. Have you measured the actual distance from the Gossler line to the Santiam Bar, which is the Crown Zellerbach property? A. Yes.

Q. What is the distance from the Crown Zellerbach land on that road?

A. May I refer to my field notes?

Q. Yes.

A. It is, I think—it is 3,250 feet. I measured it with a tape the other day. It measured 3,155 feet by tape.

Q. 3,155? A. Yes.

Q. That is approximately six-tenths of a mile, is it not? A. Yes.

(Testimony of J. H. Gallagher.)

Q. The whole road was a mile and eight-tenths?

A. On my speedometer, yes, 1.8 miles.

Mr. Dezendorf: That is all.

Recross-Examination

By Mr. Twining:

Q. Did you haul some gravel out over this road?

A. Yes.

Q. Strong & McDonald hauled some out?

A. That is right. [29]

Q. Do you know of any other parties that did?

A. Do I know——

Q. Do you know of any other parties that did, in addition to the Government?

A. No, I don't.

Mr. Twining: I think that is all.

(Witness excused.)

Mr. Dezendorf: That is the plaintiff's case.

CARL B. FORSMAN

was thereupon produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Twining:

Q. Mr. Forsman, what was your capacity at Camp Adair during the period mentioned?

A. I was Assistant Executive Officer of the Post.

(Testimony of Carl B. Forsman.)

Q. Did you, as part of your official duties, have certain negotiations about this road we have been speaking of here?

A. Not the road; not directly the road; the gravel bar.

Q. You had occasion to go over this road?

A. Yes. [30]

Q. When did you first go over it?

A. The latter part of October, 1942.

Q. Can you state what condition it was in then?

Mr. Dezendorf: If the Court please, I do not think that is material what condition it was in. It seems to me the only question here is the cost and the reasonable value of its use.

Mr. Twining: As I gather the issues in this case, the reasonable cost and value of its use ran over a three-and-a-half-year period here, the time when Strong & McDonald used it and the time when the Army used it. I do not see why the question of maintenance and the condition of the road is not important.

The Court: Answer the question.

A. Read the question.

Q. (By Mr. Twining): Can you state what condition the road was in when you first went there, in October?

A. It was in poor condition and the Army had to rebuild the road to make it usable for hauling gravel, despite the fact that some Army vehicles had hauled gravel prior to our rebuilding it, prior to our rebuilding the road.

(Testimony of Carl B. Forsman.)

Q. Were you there in the spring of 1943?

A. Yes.

Q. Did you see the road then?

A. Before and after we rebuilt it, yes. [31]

Q. Can you tell the Court what happened there that winter with regard to that road?

A. I do not quite understand your question.

Q. When you went in there first, in October, you say you had to rebuild the road, that the road was in rather bad shape?

A. Yes, we rebuilt it after the flood, just before we could begin hauling gravel for the Camp.

Q. Were you familiar with the road during the course of time the Army took out these 68,000 yards of gravel?

A. The Army maintained the road during that time.

Q. You know that of your own knowledge?

A. Yes. I don't know what the cost was, but it was maintained by the Post Engineer.

Mr. Twining: That is all.

Cross-Examination

By Mr. Dezendorf:

Q. You are the Carl B. Forsman who executed this contract with the Crown Zellenbach Corporation on behalf of the Army, are you not?

A. Yes.

Q. That is your signature on there (referring to Plaintiff's Exhibit No. 1)? A. Yes, sir.

(Testimony of Carl B. Forsman.)

Q. At the time of your negotiations with the Crown Zellerbach [32] Corporation and at the time this contract was executed, you knew that Gallagher had an agreement with Crown Zellerbach Corporation covering this road?

A. At that time, I didn't know that. I knew he had an agreement to take gravel out the road—I do not believe my first trip to the Crown Zellerbach Corporation was about the road. It was merely to get gravel at a certain price in our emergency.

Q. However, before you signed that contract, you did know about the contract?

A. That is right.

Q. With Gallagher?

A. That is right, yes, sir.

Mr. Dezendorf: That is all.

(Witness excused.)

Mr. Twining: If your Honor please, we had anticipated the testimony might take a little longer, and wanted to get Mr. Shull over here from the Crown Zellerbach Corporation. He is not available right now. He is in Astoria. I understood he was coming in this morning. I think we would like to take his testimony. He is the only witness that knows the facts and circumstances of the road conditions there and the value of the road and the amount of the reasonable royalty to be paid on the road. I would like to have the [33] privilege of placing him on the stand later. if necessary.

The Court: Do you want to offer him as a witness this afternoon?

Mr. Twining: Yes.

The Court: All right. I will be available, if that is what you want to do. With that in mind, do you want to consider the case submitted, then?

Mr. Dezendorf: I would like to make a short argument at the close of the case, your Honor. There are some points that I would like to cover.

The Court: Let us use the half hour that we have available now.

Mr. Dezendorf: All right. It is necessary, your Honor, in order to understand the condemnation action, to have in mind the relative positions of the Government on the one hand and Judge Harris and myself, as attorneys for Gallagher and the McNutts, on the other. It all appears, however, in the transcript of testimony which is available as one of the exhibits in the other case.

There were three ownerships involved over which that road went. Next to the county road was Crocker, beyond him was Gossler and then the Crown Zellerbach land. Through some oversight, the Government forgot to make Gallagher and McNutt Brothers parties in the Crocker condemnation action, although the assignment was of record. They did make Gallagher [34] and the McNutt brothers parties to the Gossler case, which affected the middle portion of the road. No effort was ever made to condemn the Crown Zellerbach property.

As the record in the Gossler case will show, prior to trial there were various motions and various mat-

ters that came up before Judge Fee and up until the time of trial—in fact, the day before the case came to trial—the Government was taking the position that all it had to do in the Gossler case was to pay the replacement cost of that one-third section of the road, and that is all.

Now, the law is clear that where the Government takes some property and does not compensate for the interest taken the persons who are left out of that case have a claim under the Tucker Act for the reasonable, fair market value of their interest taken. So, as we approach the trial of this case, Gallagher and the McNutt brothers had a pure out-and-out Tucker Act claim against the Government for whatever the value of their interest was in the Crocker land, if they had an assignment of record, and they were not joined in the condemnation proceedings; Gallagher and the McNutt brothers had a clear out-and-out Tucker Act case for the value of the stockpile of sand and gravel that was taken off the bar by the Army.

When we came to trial, however, the Government, for the first time, conceded that the measure of damages [35] for the taking of the Gossler section of the road was the reasonable, the fair market value—the reasonable and fair market value of the whole road, and we were willing to try the case on that basis, which meant that we were willing to waive the Tucker Act claim for the Crocker land because the Government obviously had title to that.

We all would have been very happy if Judge Fee had submitted the value of the whole road to the

jury but, if you will look at his instructions, he did not submit it, and that was the reason that we were anxious to move for a new trial and get another chance at getting the whole value out of the road.

Now, counsel has suggested that he thinks the Gallagher and McNutt claim is too high, but let us look at the figures. This road cost $1,190 for the easement, $1,500 for the pioneer road; $7,500 for the actual road which McNutt Brothers built of the whole road, which was $10,190.

The admitted facts show that Gallagher and McNutt Brothers hauled out over the road some 3,000 yards; Strong & McDonald, 68,000 yards, and the Army about 66,000 yards.

Gallagher and McNutt Brothers have received, on their $10,000 expenditure, $1,000 from the Government, $3,000 from Strong & McDonald, bringing their own cost in that road to $6,190. As Mr. Gallagher testified, the agreement with Strong & McDonald was for ten cents a yard for 30,000 yards they anticipated taking out. It is true they took out more but whether they knew they were going to take out more no one will ever know.

I think a fair figure to charge the Government, in order to recover for these people the unrecovered cost of the road, is approximately ten cents a mile a yard which will recover for them six thousand odd dollars, the six thousand odd dollars that they have in this and which has never been recovered.

Mr. Twining, in referring to Judge Fee's opinion stopped just before the last sentence. The last sentence is the part which suggests the filing of another

action. After what Mr. Twining read, Judge Fee continued: "If in some other case, the defendants contend that for jurisdictional reasons the interests were not legally so submitted, the question of the effect of the stipulation and this judgment can be thus considered and the rules of res judicata applied."

As I see it, the issues to be determined are relatively simple. There are only three of them and they are phrased in the pre-trial order. The first issue is whether the Government acquired ownership of that portion of plaintiffs' road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land. The answer to that will have [37] to be "No" for this reason: Condemnation actions were filed covering the Crocker and the Gossler sections. The Crown Zellerbach Corporation land was never condemned. The only thing which was litigated in the Gossler case was the value, as Judge Fee's instructions show, of the McNutt Brothers' and Gallagher's interest, in so far as the Crocker and Gossler lands are concerned, and nothing else.

The Government apparently takes the position that it acquired some kind of an interest in the road on the Crown Zellerbach Corporation property by reason of the stipulation between the Government counsel and myself, which was in November, 1944. If we assume that the Government did, at some time, acquire some interest in that road on the Crown Zellerbach Corporation land, it would be by virtue

of the stipulation in November, 1944, which was after the Government had made all this use of the road. The Government's use of the road started in October, 1942, and ended in August, 1944. This stipulation was made in November, 1944, so, even if we assume the Government did acquire some interest, it got it after it had used this road, with full knowledge of Gallagher's interest in it under the terms of his contract with the Crown Zellerbach Corporation.

That leaves only the question as to the cost of the road and the reasonable value of the use which the Government made of the road. The Army was very much put [38] on notice of Gallagher's interest in this road.

I think, under the facts disclosed in this case, Gallagher and McNutt Brothers are entitled to $6,000 in this case.

Mr. Twining: It seems to me, if your Honor please, it is all a matter of simple arithmetic. There isn't any issue in this case, not a single issue that obligates us now to pay anything. Here we have a road, a mile and eight-tenths in length, with about six-tenths of a mile of it crossing the Crown Zellerbach tract. What Mr. Dezendorf is saying is that the Government ought to be stuck, no matter what, for the balance, no matter what it is, no matter what the contract provides. That is the silliest thing I ever heard in my life.

There are 3,000 feet of road there, across the Crown-Zellerbach land, and the issues in this case are confined to payment for the use of that 3,000

feet. Whatever else may be said about this prior case, the Gossler and Crocker property had been paid for. Judge Fee, in submitting that case to the jury, read the form of verdict to the jury. How can a Judge submit an issue more clearly than that? He even read the form of verdict and told the jury it must find the full market value of the entire road, including the value of the gravel bar, or including damage to their interest in said bar by reason of the contract with the Crown Zellerbach [39] Corporation. The entire road was considered. When that jury's verdict was returned, there was no possibility of crawling around that one. If there were, it is double-blocked by the agreement entered into and then it is trebly blocked again by the fact that there is no attack upon the Gossler and Crocker property at all.

The plaintiffs here want to be paid for this 3,000 feet of road at the rate of about 40 cents a mile, on top of everything else that they have been paid. That is what they are asking. $7,500 for building that road? I haven't any figures here, and that figure will have to be accepted, as far as the proof goes, but I do not believe it. I have lived in this country too long, fishing these bars, to go along with that; I know that country too well. It is flat land. Plaintiffs say it cost $7,500 to build a mile and eight-tenths of road to a gravel bar. Plaintiffs got $3,000 from Strong & McDonald on this deal. They hauled 66,000 yards. I am not going to argue about it because it speaks for itself. There is no getting away from the fact that the Crown Zeller-

bach Corporation did not intend for these boys to go out and victimize anybody, even if they could, even if the traffic would bear it; they never intended that they should go out and slip it over on anybody at 10 or 15 or 20 cents. The Crown Zellerbach Corporation precluded that in the protection of their interests and they passed their rights on to the [40] Army, as is plain in this case. Now, the proposition here, under this theory of the case, is to get all they can, regardless of what the deal was, and there is only 3,000 feet of road involved. That has been paid for in many ways. As I said, it is just a matter of simple arithmetic to figure out what the amount of hauling cost would be.

Is it reasonable? 66,000 yards? $7,500? That is more than ten cents for 3,000 feet of road, and there is a mile and eight-tenths of road here altogether. If you haul 66,000 yards over 3,000 feet at that rate, you pay for the whole shebang, despite the reservation made by Crown Zellerbach Corporation in their contract, despite the fact that the Gossler and Crocker interests had been paid for.

I do not think there is any need for me to go into what Judge Fee said. Your Honor knows, I think, very plainly what he said in that case. He is very plainly looking forward to the rule of res judicata —very plainly, it ought to be applied here. At least, your Honor, I can sincerely say to the Court that I can see no moral reason, no reason in justice, no reason at all why, when the entire matter was placed before the jury in that other case, there should be any recovery here by these plaintiffs.

The Court said to the jury in that case, "You are to find the fair, reasonable market value" and, when the stipulation, in plain words, says, "Yes, we will agree to [41] the jury's finding the fair, reasonable value of the entire road," that is all there should be to it. The proposition then was the road from the county road clear across to the Santiam Bar, clear across the Crown Zellerbach property, including rights to the gravel bar—the entire cost of the road. They agreed to that stipulation, and the jury so found and the money was accepted and everybody went on their way. Now, despite the fact that that 3,000 feet was included in the entire road, and that the entire road was considered by this jury, they come in here and want to be paid again in this case. They received $3,000 from Strong & McDonald for the use of their road; they received $1,000 in the Gossler case and, as your Honor knows, they went in there and stockpiled gravel, and some consideration should also be given to their own use of the road. Under the terms of the contract with the Crown Zellerbach Corporation, they could not make a profit on it, because it immediately went back to the Crown Zellerbach Corporation.

There are so many reasons here why I think this whole thing is an outrage. The actual facts, the simple arithmetic involved is something that would shock anyone. 66,000 yards hauled over 3,000 feet. Figure that out and see where we get. That would be all right if it were a black pirate toll gate. Possibly, you couldn't blame him, but we are talking

about something that is not even remotely [42] within the realm of reason here.

The Court: Recess until 2:00 o'clock.

(Court reconvened at 2:00 o'clock p.m., Wednesday, March 19, 1947.)

Mr. Twining: I have one witness to call in this case, Mr. Shull.

The Court: Proceed.

J. T. SHULL

was thereupon produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Twining:

Q. Your name is J. T. Shull? A. Yes.

Q. You are an engineer for the Crown Zellerbach Corporation? A. Yes.

Q. Mr. Shull, are you familiar with the Gallagher road leading in from the county highway to the Santiam Bar, the gravel pit located at the Santiam Bar? A. Yes, I am.

Q. You are familiar with that section of it starting from the Crown Zellerbach line up to the gravel pit? A. Yes. [43]

Q. The last 3,000 feet, approximately six-tenths of a mile to the river? A. Yes.

Q. Can you describe briefly what kind of a road that was in 1941, the spring of 1941?

(Testimony of J. T. Shull.)

A. Well, it was—of course, it was a road built primarily for hauling gravel out and it was cut through the timber on the Crown Zellerbach property; approximately twelve feet wide or thereabouts and varying in some places a little wider and in some places a little narrower, but I would imagine it would average around twelve feet in width. There were some trees that had to be cut down and stumps shot out in order to grade the road through but, in general, why, it was just an ordinary rough graded road, but of course with a gravel surface.

Q. Can you say, in your judgment as an engineer, what it would cost to construct that six-tenths of a mile of road as it was then?

A. I would estimate around $2200 or a little over $2200.

Q. You have had some experience with gravel hauling operations in connection with the operations of the Crown Zellerbach Corporation?

A. Yes, I have.

Q. Assume in this case that the Army hauled out 66,643 cubic yards of gravel over that six-tenths of a mile of road, that six-tenths mile section of road there, between October, 1941, [44] and the spring of 1944, say, April, 1944, could you say what would be, in your estimation, a reasonable charge per yard for the use of this six-tenths miles for that operation?

A. Well, I would say it would be nominal, a nominal charge, because it would have to be figured

(Testimony of J. T. Shull.)

on the investment and, as I understand it, the investment was pretty much paid back. I would say two cents a yard would be a fair royalty, on just that short section of six-tenths of a mile.

Mr. Twining: I think that is all.

Mr. Dezendorf: That is all.

(Witness excused.)

Mr. Twining: Nothing further.

(Testimony closed.)

The Court: Is there further argument?

Mr. Twining: None, your Honor, except this: I would seriously like to bring to your Honor's attention the fact that this case came to me late, as your Honor knows. However, I think from the prayer of this complaint, considering the amount of value sought to be recovered here, considered in the light of what could be possibly be paid for this stretch of road, and what was paid, and what the contract with Crown Zellerbach says about it, and considering also [45] the whole history of this case, as it appears from the pre-trial order and the facts stipulated to and the exhibits that have been introduced in this case, I think it becomes very apparent that it is tremendously exaggerated, even though there is an action here.

The Court: Submitted. [46]

Monday, May 5, 1947, A.M.

Proceedings in re: Motion for New Trial, etc.

Mr. Twining: This matter, your Honor, comes up on the motion for new trial. I do not want to spend any time on some aspects of this case. I felt from the nature of the stipulation and the verdict in the former case that the matter was determined, at least some of it, upon submission to the forum of the entire issue, being the situation of the length of the road, the time element, the interest in connection with the gravel bar, and the interest having been paid on the amount determined since June 18, 1942. However, those matters were before your Honor. What I really wanted to go into here, I think, are just a few of the reasons in support of the motion which has been made here. First, I wish to say to the Court that I do not think I presented this case to well. It came to me rather late; I had not talked to any of the witnesses; there were things about it I did not have in mind.

But from the standpoint of the verdict itself, your Honor, I think it is not supported in the evidence or could be supported in law to the extent of $5,800 for these reasons—and I will try to be short here.

First, in the pre-trial order, your Honor, there are four issues formulated and they are confined entirely to the Crown Zellerbach portion of this road. Your Honor will recall, aside from any other legal effect upon this section of road, that this road represents exactly one-third of the whole or six-

tenths miles—exactly one-third. On June 18th, the other two-thirds were taken and they were compensated for in the condemnation action.

We regard this matter now the same as when this gravel hauling was done by the Government. The other two-thirds of the road are completely out of the picture; could not be considered in any way, shape or form in this case.

Going back to the Tucker Act case, the whole matter was tried, and I think necessarily so, on the basis of the reasonable market value. Aside from the contract between plaintiffs here and Crown Zellerbach Corporation, no other element could be considered as a major factor at least. The road cost cannot be at all determinative and, in fact, under the facts of this case, would not be proper.

It is true that this contract mentioned in every case—let me put it this way: That the assignees of Crown Zellerbach can use this road and plaintiffs in this case will charge a reasonable amount for that use but in no case to exceed their recovery on the road. In other words, it does not extend their recovery; it limits their recovery. The Crown Zellerbach Corporation were trying to accommodate those [48] who were hauling gravel. They said by their contract that "When this road has been paid for, you cannot charge anything." They would not have been able to charge a nickel after this road had been paid for. Crown Zellerbach were interested in selling lots of gravel cheap. That was the picture then. There were two limitations then—first, the reasonable value per cubic yard and, in no case, more than the road cost.

What happened in this case? Your Honor will recall at the time the testimony was given in regard to the cost of the road, $10,190, I objected to that and Mr. Dezendorf said it would be tied up, and the testimony was admitted subject to that situation. There is no evidence in this case, not a shred, of any reasonable value as to the road, and that matter never was tied in. The closest it came to being tied in was when I, on cross-examination, asked the plaintiff if he felt that the road on the Crown Zellerbach property was the cheapest to construct. He hesitated and he said no, that it was all about the same. Plaintiffs testified that they paid $1,190 for two easements on the other property, but that had nothing to do with the road cost and it was completely put out of the picture by the other case. That left the road construction cost $9,000, approximately, based on the testimony and, the Crown Zellerbach portion of it, being one-third, would cost $3,000. Under the contract, there [49] was to be credited to that what credit he had already received, which would take into consideration the amount received from Strong & McDonald, $3,000, and the $1,000 that they received in the other case, and their own use, a recovery in the neighborhood of $1,500.

I asked the plaintiff himself what the reasonable charge would be on that particular road, including all costs, wages, trucks, gasoline, tires, overhead and everything, and they said that people in that neighborhood charged ten cents a mile. That would bring the use of that road cost, the reasonable road

cost, down to about two or three cents per mile. Mr. Shull, the engineer from the Crown Zellerbach Corporation, said the nominal charge for use of six-tenths of a mile of road would be something in the neighborhood of two cents.

No matter how it is figured, $1,400 or $1,500 is reasonable.

I feel that the Government is being penalized, in effect, in this case. I thought perhaps the Court had not considered the contracts themselves and had considered that plaintiffs were entitled, no matter what part of the road they used, or what intervened, to recover the full balance of their unrecovered road costs. I do not think that is the case. I do not think that is the proper approach to it.

Here, for instance, the plaintiffs built this road prior to June, 1942. The complaint and pre-trial order set up the fact that within six months following Strong & McDonald moved 68.203 cubic yards of sand and gravel and then, for the following two years, our use was made of this road by the Army in removing 66,000 cubic yards of gravel, and all that was two or two and a half years after plaintiffs expended their costs. The road then might not even have been worth a cent. As a matter of fact, it was testified in the case that it was impassable in the spring of the year. There was the intervening use by Strong & McDonald; then that winter came floods and rain. There is no showing whatever even that there was a road there, as far as that is concerned, a passable road. The costs were expended

in building the road prior to any use in this case by the Government. I think there can be no doubt that we should not be charged for a road that we had the power to bar plaintiffs from themselves. I do not think, as I understand the case, after June 18th the plaintiffs could have gone upon that road.

I believe the true approach to this case as to what we must pay should be viewed as if we used the Crown Zellerbach and didn't use the other two-thirds at all. I believe the standard in this case, considered in the light of the contract with Crown Zellerbach and under the Tucker Act case, would be this: What was the position when we started out to use this road? What would be reasonable to ask us to pay? [51] If we had hauled only a hundred yards, if this standard is correct, we still could pay $5,800 for hauling a hundred yards of gravel.

I think, to understand what the Government must pay in this case, we should consider what would be reasonable for the use of this section of road. Under this basis, we would be paying here about somewhere close to 30 cents for the use of that entire road—well, 16 or 17 cents a mile for road use and haven't even begun to pay the wages of the truck driver and the gasoline and anything else. It would be a very exorbitant rate. It would be impossible, of course, on that basis.

You say here, "He is in a position to stop you from using it and make you pay for it," but I do not think we can use that standard, your Honor. Plaintiffs made their deal there. Plaintiffs received

certain income and recompense for that road. The jury compensated them as of June 18th. The Government now owns all that road, that other two-thirds.

Therefore, we used one-third of the road that, according to plaintiffs' theory of the case, was not disposed of in the condemnation case and, therefore, for that one-third of the road, which cost under $3,000, we are paying $5,800—we are paying $5,800 for hauling 66,000 yards of gravel out at a time that has never been tied in with the [52] cost of this road.

I look at this way, as if, your Honor, we used a hotel composed of three wings. It cost $100,000 to build it; it has been used for twenty years. We come in and use one wing of that hotel and then, if we take the other two and compensate the owner for them, we pay for that one wing the whole balance, over and above the income received. It does not seem to me we should apply any such standard. We have to pay for what we use, the reasonable value.

The Crown Zellerbach contract would only be a minor factor in showing what the actual road was worth. The question is, what it would be worth to use. I believe the same standard should be adopted as in condemnation cases, not what a man can charge for it or what he might get under unusual circumstances, but applying the rule as to fair market value. That is the standard used in con-

demnation cases and I think such a standard as that should be used in this case.

The sole intendment of the Crown Zellerbach contract was this: "We are going to give you this gravel; we are going to sell it to you cheap, but we are not going to be barred out of our own gravel bar; lots of people will be wanting to buy gravel. Therefore, we are going to sell it to anybody that wants it, but you have got to let them use your road. It is only equitable that you charge them a reasonable price per cubic yard for the use of the road, but nothing in [53] excess of your cost; you cannot make a profiit on your road so, after you reach the time when you have been compensated for your road, you cannot charge a nickel, you cannot charge a nickel to haul gravel over this road, even if it is worth 3 cents or 4 cents or whatever price it is worth to haul it." Then they say, "But until that time arrives, you may charge a reasonable price per cubic yard and definitely, when you have finally been paid for your road, you are through."

I do not know too much about the background, but it appears that it developed that Gallagher and McNutt Brothers' plans changed and that they did not get certain contracts. They had already received $3,000 from Strong & McDonald. At the time the jury went down to look at this property, there was a different proposition, a different situation, as of June 18th, which is the standard set for the jury; but what was the situation in late December here?

Well, at that time, if we have never used the road but condemned these two pieces, in the light of events as they were then, it is reasonable to suppose Gallagher and McNutt Brothers would never have anything coming. For us to come in now and pay twice, at this late stage, for the use of this one-third of the road—to pay twice what Strong & McDonald paid for the whole road, in other words, for a mile and eight-tenths of road—is entirely inequitable. Strong & McDonald paid $3,000 and they used a mile and eight-tenths of road. [54] Now, we come along to October, when we first came into this case, by the pleadings or any other way, as far as this action is concerned, and begin to haul gravel and it takes until October, 1944, to haul it out, and in that time use two-thirds of the road which has already been compensated for. Now, plaintiffs come along and want us to pay $5,800 for using just one-third of the road.

I have not seen a transcript, but I find no testimony at all, either as to time or place, even, of the reasonable value of that third of the road. That was never mentioned. The only amount mentioned in the whole case as to the reasonable value of the use of that road was the testimony of our engineer who said $2,300, and he said that 2 cents a yard would be ample to pay for it. That is just about what Strong & McDonald paid, and they used three times as much road. Here in this instance we are asked to pay six times as much as Strong & McDonald, and it is just something that cannot be sup-

ported by the record. I do not think there can be any intendment in the contract with Crown Zellerbach to the effect that you can turn around and, as a matter of hindsight, charge somebody. The position of the plaintiffs here, to me, is not logical, your Honor, and I think we have submitted in this case the fair and reasonable standard that must be applied here. I feel there is real merit in that.

Mr. Dezendorf: I think the Court is fully familiar with [55] the record, at least as well as we are. I do not think I care to make any argument.

The Court: I will have to review this. Mr. Holcomb has taken down the Major's argument, so he can read it to me.

Mr. Dezendorf: The only thing I can say is that Gallagher testified at the outset as to the reasonable market value of the road, what the use of the road was.

Mr. Twining: His testimony ran as to the cost of the whole road, a mile and eight-tenths.

Mr. Dezendorf: That is right. [56]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Ira J. Holcomb, Court Reporter of the above-entitled Court, do hereby certify that on the 19th day of March, A. D. 1947, and on the 5th day of May, A. D. 1947, I reported in shorthand certain proceednigs occurring in the above-entitled cause; that I thereafter caused my shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of 56 pages, numbered 1 to 56, both inclusive, constitutes a full, true and accurate transcript of said shorthand notes so taken by me on said dates, as aforesaid, and of the whole thereof.

Dated this 21st day of May, A. D. 1947.

/s/ IRA J. HOLCOMB,
Court Reporter.

[Endorsed] No. 11733. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. J. H. Gallagher, J. Ira McNutt and Earl L. McNutt, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed September 22, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11733

UNITED STATES OF AMERICA,
Appellant,

vs.

J. H. GALLAGHER, J. IRA McNUTT and
EARL L. McNUTT,
Appellee.

STATEMENT OF POINTS AND DESIGNATION OF RECORD ON APPEAL

Appellant adopts and will urge as its points on appeal the statement of points appearing in the transcript of record on file herein; and

Appellant designates, for printing, the entire certified transcript of record on file herein.

Dated at Portland, Oregon, this 2nd day of October, 1947.

/s/ HENRY L. HESS,
United States Attorney
for the District of Oregon.

CERTIFICATE OF SERVICE BY MAIL

United States of America,
District of Oregon—ss.

I, Floyd D. Hamilton, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the appellees of the foregoing Statement of Points and Designation of Record on Appeal, by depositing in the United States Post Office at Portland, Oregon, on the 2nd day of October, 1947, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to James C. Dezendorf, 800 Pacific Building, Portland 4, Oregon, Attorney for appellees.

/s/ FLOYD D. HAMILTON,
Assistant United States
Attorney.

Subscribed and sworn to before me this 2nd day of October, 1947.

[Seal] /s/ V. E. HARR,
Notary Public for Oregon.

My commission expires 1/17/51.